Supreme Court, U.S.
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In The
Supreme Court of the United States

John Green
Petitioner

v.

William Gianos, Albert Rylak, Jeffrey Martin,
Law Firm of Rylak & Gianos
Stephen Rubin

On Petition For Writ Of Certiorari
To The Third Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In New Jersey the State's highest Court set the procedures, by way of Court Rules, that both parties must follow in discovery. I ask this court the following questions.

1. Whether municipal prosecutors would violated a defendant's due process rights if they refused to provide discovery (Brady material) to a defendant by those rules unless those prosecutors are paid whatever amount of money they decide they wanted, and this money would be paid to them for their personal financial gains and is in addition to the monies that are paid to them by the municipalities to perform their duties?

2. Whether a defendant's due process rights are violated if a defendant refuses to pay fees that are not allowed by Court Rules, to a prosecutor which has a personal financial interest in these fees, and those prosecutors withhold Brady material from that person?

3. Whether it would be a violation of the Equal Protection clauses when municipal prosecutors each set their own fees for discovery and this fee would vary from municipality to municipality?

4. Whether a defendant can be given a fair trial when prosecutors have a personal financial interest in the supplying of discovery and also are subject to pending civil action against them by a defendant?

5. In a summary judgment action against a pro-se should the district court be certain that the pro-se understands his burden under Rule 56?

6. Whether a summary judgment motion should be granted before discovery is completed when there is evidence of misconduct by the defendants that denied Green Due Process and equal protection under the law.

PARTIES TO THE PROCESSING

Parties to the processing are exactly the same as in the caption

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OPINIONS BELOW

The denial for rehearing en blac, of the United States Court of Appeals for the Third Circuit is unpublished as John Green v. William Gianos, Albert Rylak, Jeffrey Martin, Law Firm of Rylak & Gianos, Stephen Rubin Docket No. 01-2502(Pa Appendix A 1A). The opinion of the United States Court of Appeals for the Third Circuit is unpublished as John Green v. William Gianos, Albert Rylak, Jeffrey Martin, Law Firm of Rylak & Gianos, Stephen Rubin Docket No. 01-2502(Pa Appendix C 5A).The opinion of the United States District Court for the District of New Jersey is unpublished as John Green v. William Gianos, Albert Rylak, Jeffrey Martin, Law Firm of Rylak & Gianos, Stephen Rubin Docket No. 00-cv-01959(Pa Appendix E 13A).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on April 18, 2002 (Pa Appendix B 3A). The Court of Appeals denied a timely petition for rehearing on June 6, 2002 (Pa Appendix A 1A). The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part:
Section 1:
"No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
."

Section 5:
"The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

Title 42 U.S.C. 1983, reads:
"Every person who, under color of any statute, ordinance, regulation,
custom, or usage, of any State or Territory, subjects, or causes to be
subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF CASE

State Level

The issues presented herein were thoroughly presented to the District and the appellate court. On January 14, 1997, petitioner, John Green was stopped and issued a traffic ticket for allegedly doing 51 MPH in a 25 MPH zone. Mr. Green believed he violated no traffic laws so he plea not guilty. Mr. Green found New Jersey case law that told of the materials that the State would need to prove it case against Green and the relevant materials that case law said he could use to prove his innocent. Just before Green could sent his discovery request to the prosecutor, Mr. William Gianos, demanding a $25.00 administrative fee for discovery that Mr. Gianos felt was relevant to the speed charge (Pa Appendix G 32A). This fee was to be paid to Gianos's law firm for his overhead(Id.) Mr. William Gianos, refused any discovery unless the prosecutor's law firm was paid a $25.00 fee State v

Green 327 N.J. Super 334, 341(App. Div 2000) . Mr. Green informed Mr. Gianos that until he produced a Court rule that said that he is entitled to a fee then Green would not pay it . Green informed Mr. Gianos that he would be filing a civil rights suit against him for his refusal to provide discovery (Pa Appendix C 6A). On, March 12, 1997, a hearing was held in Frenchtown Municipal Court before Judge Martin. Judge Martin decided that Green was entitled to certain copies of items of discovery and assured Green he would have them that day. The Court offered to make the copies of the few items that Mr. Gainos believed Green was entitled to, 2 tuning fork calibration certificates and the officer's radar operators card, if Green would agree to pay the cost of photocopying to the Borough, Green agreed. Mr. Gainos objected to supplying any discovery unless Green agreed to waiver any rights to sue Mr. Gainos for violating his constitutional rights State v Green Id at 341. Green refused (APP) and the Court took away the discovery it granted Green. Mr. Gainos was then disqualified from the case and his law partner other Frenchtown prosecutor, Mr. Rylak took his place. Mr Rylak was then also given the New Jersey Rules on discovery and case law by Green, but he too refused discovery. On or about , Sept. 9, 1998, Judge Martin found Green guilty of doing 51 MPH in a 25 MPH zone and fined him.

Green appealed to the New Jersey Superior court and Judge Martin was affirmed. Green then appealed to the appellate division of the New Jersey Superior court and his conviction was overturned. In, State v Green 327 N.J. Super 334 743 A.2d 357, the appellate court held that the speed limit of the road Green was on was only 25 MPH when children were present and since there was no evidence in the municipal court

that children were present then the limit was 50 MPH and Green was doing the speed limit. The court also commented on the problems in discovery below. The court wrote that Green would suffer hardships if convicted, and was certainly entitled to more discovery then the prosecutors were willing to give. The court also expresses concern over the $25 "fee" and the refusal to provide discovery unless defendant agreed to drop his civil suit. They knew of no authority for either, and said that the State cites none. They found that the New Jersey court rules governing discovery in the municipal court, either those in existence of the time of the infraction or currently, do not authorize a municipal prosecutor to charge what the prosecutor apparently views as an administrative fee to cover his overhead. Moreover, they found while a copying charge might be appropriate, they hardly believed a flat $25 fee even approaches a reasonable Id. at 341.

Federal District level

The issues presented herein were thoroughly presented to the Federal District Court. On, April 25, 2000 Green filed a complaint in Federal District Court in New Jersey. This court had jurisdiction pursuant to 42 U.S.C. Sec. 1983, 1986 and 1988 and the Fifth and Fourteenth Amendments. Jurisdiction is founded on 28 U.S.C. Sec. 1331 and 1343(1)(2)(3)(4) and the aforementioned statutory and Constitutional provisions. Plaintiff also invoked the pendent jurisdiction of this Court to consider claims arising under state law (Pa Appendix H 33A).

Green's complaint alleged that Mr. Gianos was using his official position to extort fees for himself and his private law firm from Green, fees that he was not

entitled to. That both Mr. Gianos and Mr. Rylak were operating in their own interest, and the interest of their law firm and not the State during the time of this dispute , so they have a conflict of interest. That Green was found guilty because he could not mount because of their actions he could not mount a defense(Pa Appendix H Page 35A Para 15-17). That Judge Martin was acting outside his authority when he linked a civil matter, Green's suit against Gianos, to Green's right to discovery.

Discovery was still going on when the defendant's submitted a motion for summary judgment. In that motion they alleged that Green was provide discovery in accordance with New Jersey Court Rules, that the defendant's, Gianos, Rylak and Rubin were entitled to qualified immunity and Judge Martin was entitled to absolute immunity. And they alleged that according to their understanding they were not being paid by the borough to provide defendants discovery. And since they allege there was probable cause for Green prosecution that malicious prosecution can not be supported.

Green opposed motion by alleging that the New Jersey appellate court already found that Green did not receive discovery according to New Jersey court rules. That the persecutors were continuously given New Jersey Court Rules and case law to show that Green was not given discovery. Green alleged with case law that providing discovery was part of their job and also produce the agreement between the borough and the prosecutor to refute their claim that they was not being paid to provide discovery. That the prosecutors were prosecuting Green maliciously and that they were abusing the process. That their law firm was also liable for their actions. That Mr. Rubin

was given notice of what the prosecutors were doing, but was indifferent to the matter. That the prosecutors were operating in a private personal interest and finance interest of their law firm in this matter. That Judge Martin acted in concert in this whole matter with the prosecutors, even having ex parte meeting with them, even conditioning Green discovery on him signing a waiver not to file a civil suit against them. When Green refused to sign this waiver Judge Martin took away the discovery he already granted. That the Judge Martin was ruling on civil issues outside his jurisdiction.

In their letter reply brief they deputed some of Green's statement of facts and that in the administrative way they provide discovery was at the prosecutor's discretion and that it was also discretionary on how Mr. Rubin could deal with the matter.

Federal Appellate Level.

The Appellate Court has jurisdiction over the district court's verdict in favor of the defendants pursuant to 28 U.S.C.A. § 1291 (West Supp. 1991). The district court had subject matter jurisdiction in this case by virtue of 28 U.S.C.A. § 1331 (West Supp. 1991) (federal question) and 28 U.S.C.A. § 1343(a)(1)-(3) (West Supp. 1991) (civil rights actions).

Green argued that the district court was viewing this case in the wrong light, that this was not prosecutors operating under any state or court rules, but they were representing their own private financial interest in the municipal court. That the district court made a finding of facts that is even beyond that allowed in this type of case. That Mathews v. Eldridge 424 U. 319 (1976) was not a

proper case to use for this type of Due Process. That in the case of Mr. Rubin, the Third Circuit has held that "actual knowledge and acquiescence" a supervisor suffices to support a claim under § 1983." That much of the evident is still in the hands of the defendants and that a better case can be made against Judge Martin after discovery is complete. That Green wasn't aware that he had to answer items in his complaint that the defendants didn't depute. That Mr. Gianos and Mr. Rylak knew at the time they were prosecuting Green that their case had a fatal problem but they continued anyway and that they abused the process. And that the affidavits of Mr. Rylak and Mr. Gianos contained hearsay. That the municipal in New Jersey were being used as cash cows.

The defendants alleged that all relevant discovery was made available to the defendant and that they had immunity.

Green replied that only the discovery that they wanted to make available to Green they did by flashing before his eyes on March 12, 1997, not the discovery that case law held is essential to a defense. They refused to allow Green to see or copy that that was essential to his defense. Green alleged that he knew that one of the items they refused to let him see would have shown the accurately of the radar unit was off by +/- 1 MPH and would have made the punishment lower. That the prosecutors had a personal interest in this case.

En Banc

Green argued that Mathews v. Eldridge was not the proper case to use in criminal due process and the United States Supreme held this in, MEDINA v. CALIFORNIA, 505 U.S. 437 (1992)

REASONS WHY THIS COURT SHOULD GRANT CERTIORARI

This court should grant this petition for certiorari this matter is of great public importance and the District Court and the Third Circuit's court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter, and reached a decision in conflict with governing Supreme Court precedent.

If this decision stands it would mean that we continue with municipal prosecutors setting fees of what ever they want, fees that they have a personal interest in, because it go into their private pockets. The fees would vary from town to town, depending on what town you are charged in, and the life style the prosecutor wanted to maintain.

Few people other then a pro se have the financial resources to bring this type of case to this level. And although going to prison for 15 days and maybe losing a drivers license and possible livelihood for some period of time may be rather minor compared to many of the cases this court handles, it affects the most people. For most Americans this is where we receive our justice, of lack of it.

1. THIS COURT SHOULD GRANT CERTIORARI BECAUSE IF PROSECUTORS HAVE A PERSONAL FINANCIAL INTEREST IN THE CASE AND ARE ALLOWED TO SET WHATEVER PERSONAL FEES THAT THEY FEEL THEY ARE ENTITLED TOO, THEN A FAIR TRIAL AND EQUAL PROTECTION CANNOT EXIST.

The Third Circuit affirmed the District Courts finding that although Green was limited to access to information he believed was relevant to his defense of the speeding ticket, not providing it at a reasonable cost this did deny him the opportunity to be heard in a meaningful manner, and possible violation of state court rules of discovery does not amount to a federal constitution violation. But the 9th circuit held in, Jackson v. Gates, 975 F.2d 648 (9th Cir. 1992), " a policy itself need only cause a constitutional violation; it need not be unconstitutional per se."

They cited Matthews v. Eldridge 424 U.S. 319 332-333 (1976) in support of their opinion (Pa Appendix C 8A). If this reasoning is allowed to stand then it would be in conflict with Due process and Equal protection clause of the Fourteenth Amendment of the United States Constitution.

Two of the defendants, Mr. Gianos and Mr. Rylak were the municipal prosecutors for the borough of Frenchtown. The duty of a prosecutor is to provide discovery, State v Green 327 N.J. Super 334, 341 (In New Jersey one of the duties of the prosecutors is to provide discovery upon request by a defendant, with no fee charged to the defendants for this service,).

Green made a proper discovery request as allowed by the New Jersey Court Rules, that the time it was R. 7:4-2(h) Id at 339. Mr. Gianos and Mr. Rylak felt, like some other municipal prosecutors, that they were entitled to monies from a defendant for their private office expenses and demanded to be paid as private attorneys in addition to the monies they were being paid by the borough of

Frenchtown[1]. This money would go not to the borough or the State but for their private use (Pa Appendix F 30A Para 15-17).

There are a few major problems with a policy like this. For this practice to go unchecked would mean that municipal prosecutors will set various fees depending what they felt their needed or wanted, and this fee for discovery that would vary from town to town. This is evidence by Green's testimony in the municipal court State v Green at 341, and the prosecutor's own affidavits (Pa Appendix F 28A-30A Para 13). The first problem would be an equal protection problem. Depending on what town you were charged in, the amount of money you would have to pay for discovery would vary for the same violation of State law. This in itself would be unconstitutional, and a violation of Green's rights.

> "no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning.

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[1] Mr. Gianos and Mr. Rylak allege that they were not being paid by the borough of Frenchtown for the administrative functions of a municipal prosecutor but was unable to support this other then their own assertions. However Green produced the total agreement between the town and the two defendants and it says nothing like that.

> Then the State has clothed one of its agents with power to annul or to evade it." Ex parte State of Virginia, 100 U.S. 339, 346 -47 (1889).

Now the defendants argue that charging what they consider to be an administrative fee is a custom in New Jersey, but that would be a violation of Green rights.

Although the District court was not convinced that by allowing the defendant Green to view the discovery material that Gianos deemed appropriate during a March 12 1997, hearing the prosecutors satisfied their discovery obligations under the Court Rules, the District Court declined to find that the enforcement of a twenty-five dollar fee amounts to a constitutional violation (Pa Appendix E 19A), and the Third Circuit agreed[2] (Pa Appendix C 8A).

Green refused to pay a fee that was unauthorized by New Jersey Court Rules to an unauthorized private party. In State v Green it says that New Jersey Court Rules R. 7:4-2 (h) was replaced by R.7:7-7 after Green's conviction. Under the comments of that rule in the New Jersey Court Rules 2002 it says;

> "As to the "fee," the court rules governing discovery in the municipal court, either those

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2 The Third circuit mistakenly found that Green was allowed to view the materials he requested in discovery at the March 12, 1997(Pa Appendix C 6A). The District Court's findings was more correct, Green was only allowed to view what Mr. Gianos viewed as appropriate, two tuning fork certificates and the officer's operating card, this is undisputed the defendant. The other possible Brady material was suppressed by the prosecutors.

> in existence of the time of the infraction or currently, do not authorize a municipal prosecutor to charge what the prosecutor apparently views as an administrative fee to cover his overhead. Moreover, while a copying charge might be appropriate, we hardly think a flat $25 fee even approaches a reasonable copying charge." State v Green 327 N. J. Super, 334, * 340, 743 A.2d 357, **360.

There is no dispute between the parties below that this twenty-five dollar fee was for their private law firm, and not to compensate the borough of Frenchtown or the State of New Jersey. The prosecutor even believed that the defendant should pay for their time to review the discovery letters.

Transcript of February 3, 1998 hearing page 6 lines 1-7 (Mr. Rylak Prosecutor)

> "It comes to us to review the letter that goes out, sending it and we deal with it. And that's the charge that we charge. We charge $25 for discovery. It's the same charge and in my opinion is in every municipality in this County that I've had experience with as a defense attorney and also as prosecutor, we charge that charge."

So when these prosecutors demanded fees for their personal law firm, they had a personal financial interest in the outcome of the Courts decision on discovery? And if they are representing their private interest in this case would that not be a violation of the Green due process right? The 5th circuit feel that is so, Brotherhood of Locomotive Firemen & Enginemen v. United States, 411 F.2d 312, 320 (CA5

1969). (appointment of interested prosecutor characterized as due process violation).

This Court has held;

> A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some [446 U.S. 238, 250] contexts raise serious constitutional questions. See Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978); cf. 28 U.S.C. 528 (1976 ed., Supp. III) (disqualifying federal prosecutor from participating in litigation in which he has a personal interest). Marshall v. Jerrico, Inc., 446 U.S. 238, 249 -250 (1980).

And;

> "The appointment of an interested prosecutor raises such doubts. Prosecution by someone with conflicting loyalties "calls into question the objectivity of those charged with bringing a defendant to judgment." Vasquez, supra, at 263. It is a fundamental premise of our society that the state wield its formidable criminal enforcement powers in a rigorously disinterested fashion, for liberty itself may be at stake in such matters. We have always been sensitive to the possibility that important actors in the criminal justice system may be influenced by factors that threaten to compromise the performance of their duty." YOUNG v. U.S. EX REL. VUITTON ET FILS S. A., 481 U.S. 787 (1987)

These prosecutors personal interest so control these

proceedings that Mr. Gianos refused to even turn over to the municipal court 3 item of discovery he felt Green was entitled to unless Green agreed not to pursue a pending private civil action against the him, State v Green.

There is little doubt that the access to Brady material in discovery is a due process right, and as this Court said in Boddie v Connecticut 401 US 371 (1971), "a statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right."

So to hold this Brady material from a defendant unless a personal interest of some prosecutors are satisfied can infect the processing with unfairness as to violate the basic tenants of due process to render it a violation of the Fourteenth Amendment.

How can a fair trial be had when there are prosecutors with personal financial interests in the controversy to be decided? Green was facing consequences of magnitude, State v Green

> "In addition to potential financial consequences related to insurance costs, a defendant charged with violation of N.J.S.A. 39:4-98 faces the potential of a fine and/or up to fifteen days of incarceration. N.J.S.A. 39:4-104. A driver's license suspension may also be imposed. N.J.S.A. 39:5-30."

This also is not to mention that it could mean a loss of livelihood for a person whose work depends on driving. What Green asked in for discovery was what the New Jersey case law said was relevant material, STATE V. WOJTKOWIAK 174 N.J. Super. 460, 416

A.2d 975 Super. Ct. App. Div. 1980 (the specific training and extent of experience of the officer operating the radar, that the device was operated in the correct manner) State v Wojtkowiak 405 A.2d 477, 170 N.J. Super 44 (That particular radar unit was independently tested and verify that it transmits at a frequency assigned to enforcement radar by the F.C.C. where the officer got his training and who trained him) State v. Finkle , 128 N.J. Super. 199, 207 (App. Div. 1974) aff'd o.b. 66 N.J. 139 (1974) (VASCAR); cf. State v. Johnson , 42 N.J. 146, 171 (1964) (drunkometer); {*241} State v. McGeary , 129 N.J. Super. 219, 244 (App. Div. 1974) (breathalyzer). (Proof of the accuracy of the particular scientific measuring device used is, however, required as a prerequisite to the admissibility of the results obtained there from.). This is essential material that the prosecutors refused to allow Green to see or copy unless he paid them personally what they felt they wanted. Green should have been given the opportunity to see this material during or before trial.

> "The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least as far as `due process' is concerned, for [a rule] which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence." 399 U.S., at 82 (footnote omitted). WARDIUS v. OREGON, 412 U.S. 470 (1973)

These prosecutors dug in their heels, and even when

where discovery would not have cost them anything (Beside they were already being paid to provide discovery by the borough) they still refused all discovery. They were going to get Green convicted unless he paid them what they wanted. They knew Green was entitled to take depositions under New Jersey State Court Rule on discovery, R. 7:4-2(h), the rule in effect at the time of appellant's offense. Green could have learned what the testimony of the complaining officer would have been, but they even refused this unless they were personally paid money

Transcript Feb. 3, 1998 page 18 lines 1-7

Mr. Rylak: The State can take the position and we'll just use the officer's independent observation of this and not use the radar if we were so inclined.

The Court: That's your decision

Mr. Rylak: Yes, but that's the decision we make. Since the defendant didn't want discovery as we had offered it, he'll have to find out at trial.

In BERGER v. UNITED STATES, 295 U.S. 78, 88 (1935) this Court wrote;

> "[i]n a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his

duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

When Green refused to pay this extortion, it became personal for these prosecutors; they were no longer disinterested parties like they should have been for Green to have a fail trial, YOUNG v. U.S. EX REL. VUITTON ET FILS S. A., 481 U.S. 787 (1987) (A prosecutor must be a disinterested party).

These prosecutors first had the financial interest in this fee they demanded, but they also had a greater interest in the pending civil suit after the municipal trial. The 4th circuit has held; "The absence of an impartial and disinterested prosecutor has been held to violate a criminal defendant's due process right to a fundamentally fair trial." Ganger v. Peyton, 379 F.2d 709, 714 (4th Cir. 1967) However the Third Circuit appears not to follow this reasoning.

THE DEFENDANT'S DID NOT HAVE QUALIFIED IMMUNITY

The District Court held that the prosecutors had Qualified Immunity, Green argued against this on appeal. The Third Circuit did not address this issue in their opinion; I assume that my arguments convinced them that the defendants, Gianos and Rylak did not have Qualified Immunity. Being that both these prosecutors are lawyers they should have been aware of the law and case law in this issue. Regardless of that, they were given the Court rules and case law by Green. They knew under state case law that Green was entitled to the type of discovery that he requested. They knew under Brady that it would be a Due

Process violation to withhold material items from Green. And the New Jersey Supreme Court Rules Committee, citing State v Green, said that at the time of the alleged offense by Green that they could not charge anything other then maybe a copying fee. Mr. Gianos refused to give Green discovery because he argued to the court that Green was not entitled to discovery for the offence Green was charged with. But Mr. Gianos latter admitted in interrogatories, at the time of the discovery request that pursuant to the New Jersey Court Rules it was his duly to provide discovery to Green for the charge he was alleged to have committed.

April 16, 2001

> Interrogatory #5- On, March 12, 1997, in your capacity as Frenchtown municipal prosecutor, did you understand that it was part of your duties to provide discovery in cases involving traffic violations?

William J. Gianos Esg

> I understood that pursuant to New Jersey Court Rules governing municipal practice, it was my duty as municipal prosecutor to provide discovery when discovery was requested, regardless of the nature of the charge.

So Mr. Gianos refuse his own affidavit that he was not being paid to provide discovery (Pa Appendix F Page 28 A Para 9-10) and his letter of Jan. 27, 1997 (Pa Appendix G 32A)

The evidence also show that Mr. Rylak and Mr. Gianos knew subjectively that they were wrong in

conditioning discovery on Green not filling a civil suit against Mr. Gianos and his law firm. How do we know that he believed this to be wrong? He says so! When the Appellate Court, State v Green, found that Mr. Gianos refused to provide discovery unless Green agreed to drop his civil suit, Mr. Rylak wrote the Appellate Court asking them to change their findings, they didn't.

NO SUPPORT IN MATHEW V ELDRIDGE FOR THIS.

Both the district and court of appeals cited, Mathews v. Eldridge, 424 U.S. 319 in support of their opinion, but this deals only with the balancing test as far as Due Process rights in regards to administrative law, and not Due Process rights in discovery in a criminal case. Even if this was a case of the prosecutors following State law or rules (this is not, they were making up the rules as they went along) then as this court already held in, MEDINA v. CALIFORNIA, 505 U.S. 437 (1992), that using the Mathews test is not proper in criminal cases.

II. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT NEEDS TO END THE CONFUSION BETWEEN CIRCUITS AS TO IF A PRO-SE SHOULD BE INSTRUCTED ON WHAT IS REQUIRED IN ANSWERING A MOTION FOR SUMMARY JUDGMENT.

The district court dismiss Greens claim of negligent infliction of emotional distress because Green did not provide any evidence of that emotion distress. Green argued two points to the Third Circuit on this. First was Green did not know that you had to defend a

cause that the moving party did not question. He argued to the Third Circuit that the defendants didn't dispute that fact.

> Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. CELOTEX CORP. v. CATRETT, 477 U.S. 317 (1986)

Various Circuits have reasoned that a Pro-se does not have the legal training as an attorney and since a motion for summary judgment can be fatal to their case that they should be instructed either by the court or the moving party that they have to defend even counts not questioned Jaxon v. Circle K Corp ., 773 F.2d 1138, 1140, 10th Cir. 1985 ("`District courts must take care to insure that pro se litigants are provided with proper notice regarding the complex procedural issues involved in summary judgment proceedings.'")McPherson v. Coombe, 174 F.3d 276, 280-81, 2d Cir. 1999 (The district court or the moving party should supply the pro-se with instructions on how to answer the motion for summary judgment), Griffith v Wainwright 772 F.2d 822, 11th Cir. 1985 (give extra notice to all pro se litigants facing summary judgement motion)

The district court should have informed a pro-se of this and allowed him to present evidence, the Third Circuit did not treat Green, a pro se, in the same manner other circuit view a pro-se.

The district court dismissed Green's state actions also, Green should have been given instructions that although the defendants did not call for the dismissal in any State actions in their motion, he had to defend it anyway. In Green's complaint he invoked the pendent jurisdiction of the Court. Many of these claims have dual State and Federal components, even if the discovery violations were not considered Federal Constitution violates (Green believes they are), then they could be viewed certainly as violations of State Court rules and Green may be able to recoup real expenses that the defendant cost him, see ABTRAX PHARMS., INC. V. ELKINS-SINN, INC. 139 N.J. 499, 655 A.2d 1368 (S. Ct. 1995).

III DISCOVERY STOPPED TOO SOON

The Third Circuit found that Green was not entitled to continue the discovery process because Green's complaint could have been dismissed for failure to state a claim upon which relief may be granted (APP) ("it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations,") NEITZKE v. WILLIAMS, 490 U.S. 319 (1989).

Green disagrees with that, Green's complaint raised issues of the prosecutor having a private financial interest in the case, and they even admit it To deny discovery because you have a financial interest in selling that service to a defendant, and you do so under color of state law or custom, and abuse your official office goes to the heart of 42 U.S.C. 1983.

"As the language itself makes clear, the central purpose of 1983 is to "give a remedy to parties deprived of constitutional rights, privileges and

immunities by an official's abuse of his position." Monroe v. Pape, 365 U.S. 167, 172 (1961) (emphasis added). IMBLER v. PACHTMAN, 424 U.S. 409,434 (1976)

In Monroe v. Pape, supra, MR. JUSTICE DOUGLAS, writing for the Court, held that the section in question was meant "to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position." 365 U.S., at 172. Through the Civil Rights statutes, Congress intended "to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." Id., at 171-172. SCHEUER v. RHODES, 416 U.S. 232 (1974)

If it is proven that Judge Martin conspired with Mr. Rylak and Mr. Gianos to deny Green discovery unless Green settles a private civil suit to the likings of the prosecutor may be a cause of action (judge's advance agreement as to outcome not judicial act). Lopez v Vanderwater 620 F.2d 1229, 1253-57 (CA9 1980) cert den 449 US 1028(1980).

Just prior to the district court granting the defendant's motion for summary judgment Green submitted a Motion to compel discovery the District Court. Magistrate Judge Honorable Freda L. Wolfson had order the defendants to, serve a response to plaintiff's production request to view the Frenchtown traffic record for the time period of January 1997 through March 1997. The defendants refused to allow Green to view these records and Green submitted a Motion to compel discovery that was pending when his case was dismissed. There was a very good reason why

these records were important to this case.

As was shown in the district Court, the Frenchtown Municipal Court had a little room in the back of the Municipal Court where everyone that had a traffic ticket would go and plea bargain down the offence with the prosecutor before trial. In exchange for a guilty plea the prosecutor charged them with a lower moving traffic violate, which meant lower insurance points, but the fine was greater then the fine would have been if they plead guilty to the original violation, but the reduced insurance points meant the over all cost to the defendant would be lower, this was undisputed in the district court. So the town makes more money, the defendant saved on his insurance for that year and everyone was happy, well except for the insurance companies. Green testified in an affidavit to the district court that he saw this was happening in the Frenchtown municipal court, over and over again. Now if Green was able to show from the court records that there was a standing policy where other defendants in a similar situation as Green were given this attractive plea bargain offer, and Green was excludes from this practice because he asserted his rights under the New Jersey Court rules, not to pay this discovery fee, then Green could show that he was not treated equally because of the prosecutors misconduct. And combine this with other evidence a reasonable jury could conclude that the prosecutors was prosecuting out of revenge and malice.

CONCLUSION

I have not address the issue of Mr.Rubin of the Law firm of Rylak & Gianos because unless the prosecutors are found to have violated Green's right

then the law firm or Mr. Rubin cannot be held accountable I understand the issue here goes far beyond Green's particular case. If certiorari is granted the ruling that this court hands down could decide how justice is done in most of the cases the average American is subject to. For this reason I decided that if this court grants certiorari my case will be argued by a qualified attorney and not myself.

I have represented the record below as accurate as possible. Therefore, Green respectfully requests that its petition for a writ of certiorari be granted.

Respectfully, Submitted,

JOHN GREEN
DATED SEPT 2, 2002

APPENDIX A

PS Merit # 112
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 01-2502

JOHN GREEN,
Appellant

V.

WILLIAM GIANOS; ALBERT RYLAK;
JEFFREY MARTIN;
LAW FIRM OF RYLAK & GIANOS;
STEPHEN RUB IN

On Appeal From the United States District Court
For the District of New Jersey
(D.C. Civil No. 00-cv-0 1959)
District Judge: Honorable Anne E. Thompson

Present: BECKER, SLOVITER, SCIRICA,
NYGAARD,
AUTO, ROTH, McKEE, RENDELL, BARRY,
AMBRO,
FUENTES, ALDISERT*, and GREENBERG**,
Circuit Judges

* Hon. Ruggero J. Aldisert, Senior Judge of the United States Court of Appeals for the Third Circuit; vote limited to panel hearing only.

** Hon. Morton I. Greenberg, Senior Judge of the United States Court of Appeals for the Third Circuit; vote limited to panel hearing only.

SUR PETITION FOR PANEL REHEARING
WITH SUGGESTION FOR REHEARING IN BANC

The petition for rehearing filed by appellant having been submitted to all judges who participated in the decision of this court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is hereby DENIED.

BY THE COURT:

s/Judge M. Rendell
Circuit Judge

Dated: June 6, 2002

lwc/cc: Mr. John Green
Victor A. Rotolo, Esq.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NO. 01-2502

JOHN GREEN,

Appellant

V.

WILLIAM GIANOS; ALBERT RYLAK;
JEFFREY MARTIN;
LAW FIRM OF RYLAK & GIANOS;
STEPHEN RUBIN

On Appeal From the United States District Court
For the District of New Jersey
(D.C. Civil No. 00-cv-0 1959)
District Judge: Honorable Anne E. Thompson

Submitted Under Third Circuit LAR 34.1(a)
April 17, 2002

Before: RENDELL, ALDISERT, and GREENBERG,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey. On consideration whereof, it is now here

ORDERED and ADJUDGED by this Court that the order of the District

Court entered on May 7, 2001 be, and the same is, hereby affirmed.
All of the above in accordance with the Opinion of this Court. Costs taxed against the appellant.

ATTEST:
s/ Marcia Maidron
Marcia M. Waidron, Clerk

Dated: April 18, 2002

Certified as a true copy and issued in lieu
of a formal mandate on June 14, 2002.
Teste: s/ Marcia M Waidron .

Clerk, United States Court of Appeals
for the Third Circuit

APPENDIX C
UNREPORTED-NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 01-2502

JOHN GREEN,
Appellant

V

WILLIAM GIANOS; ALBERT RYLAK;
JEFFREY MARTIN;
LAW FIRM OF RYLAK & GIANOS;
STEPHEN RUBIN

On Appeal From the United States District Court
For the District of New Jersey
(D.C. Civil No. 00-cv-01959)
District Judge: Honorable Anne E. Thompson

Submitted Under Third Circuit LAR 34.1(a)
April 17, 2002

Before: RENDELL, ALDISERT, and GREENBERG,
Circuit Judges
(Filed: April 18, 2002)

PER CURIAM

OPINION

On January 14, 1997, appellant John P. Green was ticketed for speeding by

Frenchtown Chief of Police Raymond Smith. Chief Smith was parked near an elementary school and operating a *K-55* radar device, which he had previously determined to be operating accurately. When Chief Smith first observed Green's 1989 Subaru station wagon, Green appeared to be exceeding the 25 miles per hour speed limit. Chief Smith thought that Green was driving 45 to 50 miles per hour. When he locked the K-55 radar device onto Greens vehicle he got a reading of 51 miles per hour. He stopped Green and issued him a summons for doing 51 miles per hour in a 25 miles per hour zone. Green was upset, and, as a result, Chief Smith recalibrated the K-55 radar device, but it was operating properly.

Green chose to contest the ticket. He served comprehensive discovery requests on Frenchtown Municipal Prosecutor William Gianos. Gianos, who works out of a private law office, demanded a $25.00 fee for photocopying the requested documents. Green refused to pay the fee and Gianos refused to turn over the requested materials. Green threatened Gianos with a federal civil rights lawsuit. When the matter came before the Honorable Jeffrey Martin, Frenchtown Municipal Court Judge, he tried to settle the matter, suggesting that Gianos provide copies of the requested documents for a reasonable per page rate in exchange for Greens agreement not to sue Gianos. The parties would not budge from their respective positions. Green was, however, permitted to view the materials he requested in discovery at this March 12, 1997 hearing. Judge Martin then found Green guilty of speeding. Green appealed, and the Superior Court, Law Division, Hunterton County, affirmed.

The Appellate Division, however, reversed,

holding that the evidence was insufficient to support the conviction. State v. Green, 743 A.2d 357 (N.J. Super. Ct., App. Div. 2000). The appellate court held that the state had not met its burden of proving that the 25 miles per hour speed limit applied. The relevant statute established a 25 miles per hour speed limit only when children are going to and from school during opening or closing hours or are visible from the roadway during recess. Although Chief Smith was parked across from the elementary school in anticipation of dismissal of the kindergarten class, he admitted that the class had not yet been dismissed. Moreover, the state had expressly waived any attempt to establish a 25 miles per hour speed zone through a county resolution. Id. at 359 & n.1. The Appellate Division went on to sharply criticize the practice of charging a $25 administrative fee to cover the cost of responding to an authorized request for discovery. The court stated: "[W]hile a copying charge might be appropriate, we hardly think a flat $25 fee even approaches a reasonable copying charge." Id. at 361.

Green then filed the instant civil rights action alleging malicious prosecution and a violation of due process pursuant to 42 U.S.C. § 1983 against William Gianos and his partner Albert Rylak, who took over the prosecution from Gianos, their firm, Rylak & Gianos, Judge Martin, and Stephen Rubin, the Hunterton County Prosecutor. Green also included common law counts for intentional and negligent infliction of emotional distress in his complaint. He sought compensatory damages in the amount of$1,540.00 and $2 million dollars in punitive damages. The defendants moved for summary judgment, and Green moved to compel discovery. In an order entered on May 7, 2001, the District Court

granted summary judgment to the defendants. Green appeals.

We will affirm. "Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." Matthews v. Eldridge, 424 U.S. 319, 332 (1976) (internal quotations removed). We agree with the District Court that, although Green was somewhat limited in his access to information he believed was relevant to his defense of the speeding ticket, the refusal to provides copies at a reasonable cost of all items requested in discovery did not deny him the opportunity to be heard in a meaningful manner. Id. at 333. This possible violation of the state court rules of discovery does not amount to a federal constitutional violation. - -

In New Jersey the county prosecutor has general supervisory power over municipal prosecutors. State v. Ward, 696 A.2d 48, 51 (N.J. Super. Ct., App. Div. 1997). Where a policy in question concerns the failure to train or supervise municipal employees, liability under 42 U.S.C. § 1983 requires a showing of deliberate indifference. Carter v. City of Philadelphia, 181 F.3d 339, 357 (3d Cir. 1999). Failure to train or supervise may amount to deliberate indifference where the inadequacy is likely to result in a violation of constitutional rights. Id. (citing City of Canton v. Harris, 489 U.S. 378, 390 (1989)). Here the alleged inadequacy was unlikely to, and in fact did not, result in a violation of federal constitutional rights. Liability thus cannot be imposed on Huntington County Prosecutor Rubin with respect to the $25 administrative fee either.

In an action for malicious prosecution under the common law of New Jersey, a plaintiff must show that charges were brought without reasonable or probable cause, that the conduct was actuated by malice, and that the prosecution terminated favorably to the plaintiff. Lind v. Schmid, 337 A.2d 365, 368 (N.J. 1975). A plaintiff asserting a constitutional malicious prosecution claim must show some deprivation of liberty consistent with the concept of seizure in addition to showing the elements of the common law tort. See Gallo v. City of Philadelphia, 161 F.3d 217 (3d Cir. 1998).

Green failed to show that there was a lack of probable cause either for the traffic stop or the prosecution by Gianos and Rylak of the speeding violation. The state established the reliability of the *K-55* radar reading beyond a reasonable doubt. State v. Green, 743 A.2d at 358-59. Moreover, Chief Smith referred in his testimony to posted speed signs that indicated that the zone was a 25 miles per hour speed zone. Id. Gianos and Rylak had an objectively reasonable belief that they had probable cause to prosecute Green for a speeding violation even though the state ultimately was unable to prove beyond a reasonable doubt that children were moving at the time Green was stopped.[1]

With respect to Judge Martin, judges are absolutely immune from a suit for money damages for actions they have taken in their role as judges. Pierson v. Ray, 386 U.S. 547 (1967). A judge's "errors may be corrected on appeal, but he should not have to

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[1]Because Gianos and Rylak are not liable for any federal civil rights violation, the Law Firm of Rylak & Gianos is not liable either.

fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decisionmaking but to intimidation." Id. at 553. Judge Martin did not exceed his authority in attempting to settle the discovery dispute between Green and Gianos.

Finally, the counts for intentional and negligent infliction of emotional distress fail for the reasons given by the District Court. Moreover, because Green's complaint could have been dismissed for failure to state a claim upon which relief may be granted, see Fed. R. Civ. Pro. 12(b)(6), he was not entitled to discovery in this federal civil rights matter.

We will affirm the order awarding summary judgment to the defendants.

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 00-1959 (AET)

JOHN GREEN,

Filed
May 07 2001
AT 8:30 M
WILLIAM T. WALSH
CLERK

Plaintiff,

v. : ORDER

WILLIAM GIANOS, ALBERT RYLAK, JEFFREY MARTIN, STEPHEN RUBIN, and the LAW FIRM OF RYLAK & GIANOS

Defendants.

This matter having been brought before the Court upon the motion of defendants for summary judgment, and the Court, having reviewed and considered the papers submitted in support of and in opposition to said motion, and for good cause shown,

IT IS on this day of May 7th 2001,

ORDERED that defendants' motion is GRANTED; and it is further
ORDERED that this case is closed.

S/ Anne E Thompson
ANNE E. THOMPSON U.S.D.J.

ENTERED OF
THE DOCKET
on 5-7-2001
WILIAM T. WALSH CLERK
By s/ JA
(Deputy Clerk)

RECEIVED
WILLIAM T. WALSH
2001 May 7 P 4:27
UNITED STATES
DISTRICT COURT

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Filed
May 07 2001
AT 8:30 M
WILLIAM T. WALSH
CLERK

JOHN GREEN,
Civil No. 00-1959 (AET)
Plaintiff,

v. : OPINION

WILLIAM GIANOS, ALBERT RYLAK,
JEFFREY MARTIN, STEPHEN RUBIN,
LAW FIRM OF RYLAK & GIANOS
Defendants

RECEIVED
WILLIAM T. WALSH CLERK
2001 MAY 7 P 3:37
UNITED STATES
DISTRICT COURT

THOMPSON, U.S.D.J.

This matter is before the Court on the motion of defendants for summary judgment. The motion is opposed by plaintiff John Green. The Court decided this motion after considering the written submissions of the parties pursuant to Federal Rule of Civil Procedure 78. For the reasons stated herein, defendants' motion is granted.

BACKGROUND

On or about January 14, 1997, plaintiff was

issued a speeding summons in Frenchtown, New Jersey. Shortly-thereafter, plaintiff made a written discovery request to defendant Gianos, who serves as the Frenchtown Municipal Prosecutor. Plaintiff sought: (1) documents and other materials relating to the establishment of the speed limit on the road at issue; (2) copies of the log books of the officer who issued the summons; (3) copies of both sides of the officer's copy of the ticket; (4) a description of the radar device, dates of calibration and maintenance history; (5) copies of calibration slips for tuning forks used to calibrate the radar unit; (6) copies of the calibration records for the police car's speedometer; and (7) the officer's training records and employment history. See Certification of Victor A. Rotolo, Exhibit C. Gianos informed plaintiff that the discovery relevant to the speeding ticket would be provided if plaintiff paid a twenty-five dollar ($25) fee to cover the administrative costs of copying. See id., Exhibit D. Plaintiff refused to pay the fee and threatened to bring a legal action against Gianos. ¶id., Exhibit H.

On or about March 12, 1997, an initial hearing was held before Frenchtown Municipal Court Judge Jeffrey Martin, also a defendant in the instant matter. During the hearing, Judge Martin suggested that defendant Gianos provide copies of the requested discovery to plaintiff in exchange for plaintiff's willingness to sign a release agreeing not to sue defendant Gianos. See Affidavit of John Green, at ¶ 38. Plaintiff refused to sign the release. see id., at ¶ 40. Thereafter, plaintiff moved to dismiss the speeding ticket based on the failure to provide discovery. That motion was denied and on September 9, 1998, Judge Martin found plaintiff guilty of speeding. See id., Exhibit K. Plaintiff appealed and the finding of guilt was affirmed by the Superior Court of New Jersey, Law

Division, Hunterdon County. Plaintiff also appealed that decision and the Appellate Division reversed the guilty finding on January 19, 2000. See State v. Green, 327 N.J. Super. 334 (App. Div. 2000).

The reversal was based solely upon the inability of the prosecution to establish guilt beyond a reasonable doubt. See id. at 336. Specifically, the Appellate Division concluded that the prosecution had failed to meet its burden of proving that the school speed limit applied at the time that plaintiff was issued the ticket. See id. at 338-39. Although the sole ground for the reversal was the prosecution's inability to prove this fact, the court also felt compelled to comment on the discovery disputes that are at issue in the instant case. The court stated:

> We also express our concern over the $25 "fee" and the refusal to provide discovery unless defendant agreed to drop his civil suit. We know of no authority for either, and the State cites none. As to the "fee," the court rules governing discovery in municipal court, either those in existence of the time of the infraction or currently, do not authorize a municipal prosecutor to charge what the prosecutor apparently views as an administrative fee to cover his overhead. Moreover, while a copying charge might be appropriate, we hardly think a flat $25 fee even approaches a reasonable copying charge.

Id. at 341.

Plaintiff initiated this suit pursuant to 42 U.S.C. § 1983. Plaintiff's primary allegation is that defendants' actions constitute a due process violation. In addition to the due process allegations, the complaint includes counts for: (1) intentional and negligent infliction of emotional distress against defendant Gianos; (2) intentional and negligent infliction of emotional distress against defendant Rylak who is also a municipal prosecutor and a partner of Gianos; (3) intentional and negligent infliction of emotional distress against Judge Martin; (4) malicious prosecution and malicious use of process against Gianos; (5) respondeat superior claim against –the law firm of Rylak & Gianos; (6) failure to supervise claim against defendant Rubin who is the Hunterdon County Prosecutor; and (7) negligent infliction of emotional distress against Rubin. Plaintiff seeks a judgment declaring the aforementioned policy unconstitutional, compensatory damages and punitive damages.

DISCUSSION

Summary Judgment Standard

A court may enter summary judgment if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. FED. R. Civ. P. *56;* Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Rule *56* requires the moving party to make a prima facie showing to that effect. See Celotex, 477 U.S. at 331 (Brennan, J. dissenting). Where the moving party will not carry the burden of persuasion at trial, that party may either: (1) submit affirmative evidence that negates an essential element of the nonmoving party's claim, or (2) demonstrate that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. See id.

Once the moving party has satisfied this initial burden, the opposing party must establish that

a genuine issue exists. Jersey Central Power & Light Co. v. Lacey Township, 772 F.2d 1103, 1109 (3d Cir. 1985), cert. denied, 475 U.S. 1013 (1986). Not every issue of fact will be sufficient to defeat a motion for summary judgment; issues of fact are genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Further, the opposing party cannot rest upon mere allegations; it must present actual evidence that creates a genuine issue of material fact. id. at 249 (citing First Nat'l Bank of Arizona v. Cities Service Co., 391 U.S. 253, 290 (1968)). The court must draw all reasonable inferences in the opposing party's favor, and must accept that party's evidence when considering the merits of the summary judgment motion. See Pollock v. American Tel. & Tel. Long Lines, 794 F.2d 860, 864 (3d Cir. 1986).

In deciding a-motion for summary judgment, it is not the court's role to make findings of fact, but to analyze the facts presented and determine if a reasonable jury could return a verdict for the nonmoving party. See Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1363 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993). It is in this light that the Court must analyze the facts of this case.

Due Process Claims Against Gianos and Rylak

Defendants claim that plaintiff was .provided with discovery in accordance with the New Jersey Court Rules and that there was no deprivation of plaintiff's due process rights. Defendants assert that plaintiff viewed the discovery materials during the March 12, 1997 hearing and that pursuant to New Jersey Court Rule 7:7-7 defendants have satisfied

their obligations with respect to discovery. Rule 7:7-7 states:

> In all cases involving a consequence of magnitude or when ordered by the court, the defendant, on written notice to the municipal prosecutor or private prosecutor, shall be allowed to inspect, copy, and photograph or to be provided with copies of any relevant [materials.][1]

Thus, defendants claim that plaintiff's viewing of the material at the March 12, 1997 hearing suffices as an "inspection" under the rules. Further, defendants note that such a administrative fee is commonplace and used in some form or another in many municipalities throughout the state. For this proposition, they cite to the Appellate Division decision in Green in which the Court stated "we have a sense that the heart of the contention, the $25 so-called administrative fee, may be the rule rather than the exception." 327 N.J. Super. at 342.

First, this Court notes that the frequency with which an administrative policy is utilized by municipal prosecutors does not necessarily indicate the constitutionality or propriety of that policy. Further, defendants use of the Appellate Division's comments on the widespread use of a flat administrative fee to support their argument that the policy is appropriate is misleading. A full reading of the opinion and that portion, in particular, leaves no doubt that the court

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[1] The Court Rules in effect in 1997, the year this dispute arose, are similar and shed no further light on the propriety of an administrative charge. See R. 7:4-2(h); R. 3:13-2; R.3:13-

was concerned with the use of the fee, not supportive or accepting of the policy. Furthermore, this Court is not convinced by the argument thqt allowing plaintiff to view the discovery material that Gianos deemed appropriate during the March 12 hearing completely satisfied defendants' discovery obligations under the Court Fules. The rules state that plaintiff is entitled to make copies of the discovery or have those copies provided to him.

However, the Court declines to find that the enforcement of the twenty-five dollar fee amounts to a constitutional violation. Defendants' insistence on the fee did not "so infect the [proceedings] with unfairness" as to violate the basic tenants of due process. See Marshall v. Hendricks, 103 F. Supp.2d 749, 776 (D.N.J. 2000)(quoting Darden v. Wainwright, 477 U.S. 168 (1986)). The Court concludes that although plaintiff was somewhat limited in his access to the information that he deemed important, the enforcement of the twenty-five dollar fee did not deny plaintiff the opportunity to be heard in a "meaningful manner." Mathews v. Eldridge, 424 U.S. 319 (1976). However, the Court strongly suggests that municipality revisit the appropriateness of requiring a flat twenty—five dollar fee, as opposed to per page fee or no fee at all.

Qualified Immunity for Gianos and Rylak

Even if there was evidence before this Court sufficient to establish a due process violation, Gianos and Rylak would be entitled to qualified immunity with respect to the claims against them in their individual capacities. "[T]he doctrine of qualified immunity protects the actions of municipal officials except when they act in a 'plainly incompetent'

manner or when they 'knowingly violate the law." Acierno v. Cloutier, 40 F.3d 597, 620 n.16 (3d Cir. 1994) (quoting Malley v. Briggs, 475 U.S. 335 (1986)). Qualified immunity is available if "a reasonable [official] would have believed [his or her] actions to be lawful, in light of the clearly established law and the information the. . . [official] possessed." Anderson v. Creighton, 483 U.S. 635, 641 (1987). Thus, "even where the officials clearly should have been aware of the governing legal principles, they are nevertheless entitled to immunity if based on the information available to them they could have believed their conduct would be consistent with those principles." Acierno, 40 F.3d at 620. In the instant case, the actions of these two defendants were not "plainly incompetent," nor does the evidence suggest that they "knowingly violated the law." There appears to be no law prior to this incident even suggesting that such a fee was improper, much less clearly establishing the impropriety of such a fee.

The issue of whether immunity is available also has a subjective element. The Supreme Court has noted that the "test focuses not only on whether the official has an objectively reasonable basis for that belief, but also on whether '[t]he official himself [is] acting sincerely and with a belief that he is doing right. . . ." Gomez v. Toledo, 446 U.S. 635, 641 (1980) (quoting Wood v. Strickland, 420 U.S. 308, 321 (1975)). The evidence available in this case suggests that these defendants believed the administrative fee was proper and such a view was supported by their knowledge of the prevalence of these fees in other municipalities. See Certification of Victor Rotolo, Exhibit F. Thus, the Court concludes that these defendants are entitled to immunity under these circumstances.

Intentional Infliction of Emotional Distress Claims Against Gianos and Rylak

To establish a claim for intentional infliction of emotional distress, a "plaintiff must establish intentional and outrageous conduct by the defendant, proximate cause, and distress that is severe." Buckley v. Trenton Saving Fund Society, 111 N.J. *355*, 266 (1988). The conduct of the defendant "must be 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Id. (quoting RESTATEMENT.(SECOND) OF TORTS § 46 cmt. d). Plaintiff has alleged no behavior on the part of the defendants that could be construed as "intentional and outrageous." Under no reasonable interpretation could the twenty-five dollar discovery fee be considered "atrocious" or "utterly intolerable in a civilized society." Furthermore, although plaintiff claims that he "suffered great emotion [sic] stress and pain" plaintiff has failed to submit any evidence of emotional distress that he has experienced as a result of this experience. These claims must also be dismissed.

Negligent Infliction of Emotional Distress Claims Against Gianos , Rylak and Rubin

As with a claim for intentional infliction of emotional distress, a plaintiff alleging negligent infliction of emotional distress must, among other things, demonstrate an emotional injury. See Lacy v. Cooper Hosp./Univ. Med. Ctr., 745 F. Supp. 1029, 1035 (D.N.J. 1990) As noted above, plaintiff has not done so. Thus, this claim is dismissed.

Malicious Prosecution and Malicious Use of Process Claim Against Gianos

To succeed on a claim of malicious prosecution, a plaintiff must prove "(1) that the criminal action was instituted by the defendant against the plaintiff, (2), that it was actuated by malice, (3) that there was an absence of probable cause for the proceeding, and (4) that it was terminated favorably to the plaintiff." Lind v. Schmid, 67 N.J. 255, 262 (1975). In the instant case, plaintiff has offered no evidence to suggest that defendant Gianos acted with malice at any point in the proceeding. Further, there ir no evidence to establish that there was a lack of probable cause for the traffic stop or prosecution of the speeding charge. Plaintiff was stopped for driving fifty-one miles per hour. See Affidavit of John Green, at ¶ 14. It appears that, at most, the relevant speed limit was fifty miles per hour, though defendants assert that it is twenty-five miles per hour and fifteen miles per hpur when the school zone speed limit is applicable.

Regardless of whether the speed limit was fifty, twenty-five or fifteen at the time of the stop, the police officer had probable cause to make the stop. Consequently, there is nothing in the record which would suggest that defendant Gianos improperly prosecuted plaintiff for speeding. To establish a malicious use of process claim, a plaintiff must prove that the action: "(1) was brought without probable cause; (2) was actuated by malice; (3) was terminated favorably to plaintiff; and (4) that plaintiff suffered a special grievance." Baglini v. Lauletta, No. A-907-98T2, 2001 WL 303887 at *20 (App. Div. Mar. 30, 2001). As noted above, plaintiff can satisfy neither the probable cause element, nor the malice element. This claim must be dismissed.

Failure to Supervise Claim Against Defendant Rubin

Plaintiff's claim against defendant Rubin, the Hunterdon County Prosecutor, appears to be a failure to supervise claim. In a section 1983 case alleging a failure to supervise, the plaintiff must show that the supervisor acted with "deliberate indifference" to the rights of people interacting with the employee. See Carter v. City of Philadelphia, 181 F.3d 339, 357 (3d Cir. 1999), cert. denied, 528 U.S. 1005 (1999); Sample v. Diecks, 885 F.2d 1099, 1117 (3d Cir.1989). Specifically, plaintiff must show that "(1) municipal policymakers know that employees will confront a particular situation; (2) the situation involves a difficult choice or a history of employees mishandling; and (3) the wrong choice by an employee will frequently cause deprivation of constitutional rights." Carter, 181 F.3d at 357. Plaintiff in the instant case has offered no evidence which would tend to satisfy any of these elements. Furthermore, like Gianos and Rylak, Rubin is also entitled to qualified immunity protection with respect to plaintiffs claims against him individually.

Claim Against the Law Firm of Rylak and Gianos

Plaintiff asserts that the law firm is responsible for the actions of its partners. This claim has no merit. First, defendants Rylak and Gianos were not acting as members of the firm, but rather in their official capacities as municipal prosecutors. The law firm had no involvement in this dispute. Further, even if defendants were acting as members of the firm, this claim would have to be construed as a respondeat superior claim. It is well established that "[r]espondeat superior or vicarious liability will not attach under § 1983." Canton v. Harris, 489 U.S. 378,

385 (1989); see also Allison v. Badgett, 95 F.3d 1156 (9t~1 Cir. 1996) (a "law firm cannot be liable under § 1983 for the actions of its lawyers based on a theory of respondeat superior").

Claims Against Judge Martin

Judge Martin is entitled to absolute judicial immunity and all claims against him must be dismissed. In Figueroa v. Blackburn, 208 F.3d 435, 437 (3d Cir. 2000), the Court of Appeals held that judges of courts of limited jurisdiction, such as municipal judges, are entitled to absolute immunity for their judicial acts. There are only two circumstances in which a judge may be held liable. First, "a judge is not immune from liability for nonjudicial acts, . . ." Id. at 440. Fuither, "a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction." Id.

Judge Martin clearly had jurisdiction over the matter involving the speeding ticket. The applicable New Jersey statute states that "[a] municipal court has jurisdiction over the following cases within the territorial jurisdiction of the court: . . . (b) Violation of the motor vehicle and traffic laws. . . ." N.J.S.A. 2B:12-I7. The parties were before Judge Martin because of the discovery dispute relating to the alleged motor vehicle violation.

Furthermore, Judge Martin's acts were judicial in nature. "Factors which determine whether an act is a 'judicial act' 'relate to the nature of the act itself, i.e., whether it is a function normally performed by a judge, and to the expectation of the parties, i.e., whether they dealt with the judge in his judicial capacity." Figueroa, 208 F.3d at 443 (quoting Stump v.

Sparkman, 435 U.S. 349, 362 (1978)). Certainly the parties were dealing with Judge Martin in his judicial capacity since they were appearing before him regarding a discovery dispute. Additionally, the evidence indicates that Judge Martin was simply trying to facilitate a mutually acceptable resolution to a dispute between the parties and not attempting to improperly coerce plaintiff into waiving his rights. ~ Certification of Victor Rotolo, Exhibit I, at 19. The act of suggesting the compromise was a judicial act and Judge Martin is therefore entitled to judicial immunity.

CONCLUSION

For the foregoing reasons, defendants' motion for summary judgment is granted. The Court will file an appropriate Order.

Dated: May 7, 2001

APPENDIX F

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Attorneys for Deiendant(s)
File 9000.12/9000.13/2102.00

WILLIAM GIANOS, ALBERT RYLAX, HONORABLE JEFFREY MARTIN, LAW FIRM OF RYLAK & GIANOS and HONORABLE STEPHEN RUBIN

VAR:sjr (5682)

UNITED STATES DISTRICT COURT DISTRICT OF NEW JERSEY

Plaintiff(s),

JOHN GREEN

Civil Action No. 001959(AET)

Defendant (s),

WILLIAM GIANOS, ALBERT RYLAK, JEFFREY MARTIN, LAW FIRM OF RYLAK & GIANOS AND STEPHEN RUBIN

AFFIDAVIT OF WILLIAM J. GIANOS, ESQ. IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

STATE OF NEW JERSEY:

SS.

COUNTY OF HUNTERDON:

WILLIAM J. CIANGS, ESQ., upon oath, deposes and states *as* follows:

1. I am a Defendant in the above matter and a Partner in the law firm of Rylak & Gianos, a partnership and also a Defendant in this matter.

2. As a Defendant, I am personally aware of the facts in this case, and submit the following statements in support of Defendants' Motion for Summary Judgment.

3. I graduated from Seton Hall University School of Law in Newark, New Jersey in 1982.

4. I am currently a member in good standing of the State Bar of New Jersey, Hunterdon County Bar Association and Hunterdon County Bar Association Committee of Professionalism.

5. In my twenty years of legal practice, I have never been, nor am I now, the subject of a disciplinary action in the jurisdiction of New Jersey.

6. In addition to my practice as a private attorney, I have served as Assistant Municipal Prosecutor for the following Townships and Boroughs in Hunterdon County:

a) Frenchtown Borough;

b) Aexandria Township;

c) Holland Township; and

d) Milford Borough.

7. I have also served as a municipal attorney in the following capacities:

a) Readington Township Planning Board Attorney;

b) Flemington Borough Planning Board Attorney; and

c) West Amwell Township Board of Adjustment Deputy Attorney.

8. In my capacity as Municipal Prosecutor for Frenchtown, I was paid by the Joint Municipal Court of Frenchtown.

9. Specifically, I was paid by the Joint Municipal Court municipalities, four in number, to appear in court and prepare cases for trial.

10. I was not paid by the Joint Municipal Court to perform the administrative functions of a municipal prosecutor, which includes the locating, compiling and copying of discovery.

11. Based on my understanding that some years ago the New Jersey Supreme Court determined all discovery would be handled through the prosecutor's office, I adopted the process utilized by every prosecutor I know, which is to charge for discovery.

12. Moreover, I adopted this procedure with the knowledge that I must provide discovery in accordance with New Jersey Court Rules, and that such Rules do not expressly prohibit charging a discovery fee.

13. The fee I charged for the provision of discovery was a flat administrative fee of twenty-five dollars ($25.00). I have always considered this a fair fee since I am personally aware municipal prosecutors for the following New Jersey municipalities charge a higher amount:

Township of Bethlehem — municipal prosecutor charges $35.00 for discovery; this amount represents payment for administrative processing of the discovery request and must be made payable to the prosecutor's private practice.

Borough of Bloomsbury — same as above

Borough of Hampton — same as above

Borough of Califon - same as above

Clinton Township — same as above

Tewksbury Township — same as above

Franklin Township — same as above

Borough of Glen Gardner — same as above

Borough of Lebanon — same as above

Lebanon Township — same as above

Borough of High Bridge — same as above

Raritan Township - municipal prosecutor charges $35.00 for providing discovery.

Readington Township — same as above

Delaware Township - municipal prosecutor charges for discovery from the Township

Police at a rate of $10.00 for the first three pages and $1.00 for each additional page. Although this is not a flat fee, it is a fee that would causePlaintiff's voluminous request in the present matter to cost much more than $25.00.

14. It is, and always has been, my belief that charging a discovery fee is common practice among municipal prosecutors because most are also private practice attorneys. Accordingly, absent reimbursement for the expenses of providing discovery, such costs would have to be borne by these private attorneys and their firms.

15. Moreover, the costs associated with providing discovery are not always solely related to copying documents already in the possession of the prosecutor(s) ; to the contrary, defendants often request documents that require additional work to obtain.

16. Unlike the County Prosecutor's Office, the law offices of private practicing attorneys that also serve as municipal prosecutors, such as myself, are not appointed secretarial staffs to provide discovery or help in investigations. Therefore, my firm's regular secretarial staff must perform any necessary gathering and copying of discovery.

17. Finally, the expenses a private law firm must incur by having its own staff gather and copy discovery is not necessarily the only financial burden; often, municipal prosecutors (and thus their private practices) are required to cay local police departments for their copying costs and the like.

18. In the present matter, Plaintiff John Green requested a substantial amount of discovery after having been issued a speeding summons in Frenchtown. His request did not simply call for documents already in our possession to be photocopied. Rather, it called for affirmative action by

BEST AVAIL

my office to investigate and obtain numerous documents, including the following:

a) the arresting officer's log book for the date Plaintiff was issued a speeding summons;

b) a description of the device used to measure Plaintiff's speed, when it was calibrated, and the maintenance and repair history;

c) the calibration slip for the tuning forks used to calibrate the radar unit; and

d) the officer's training record on the radar device.

19. Obtainment of much of the discovery Plaintiff requested in this matter would have entailed additional work by my office that would have cost my private practice both money and time.

20. Accordingly, I believe the twenty-five dollar ($25.00) fee we requested in this case was both reasonable and appropriate.

s/ William J. Gianos
William J. Gianos Esq.

Sworn and subscribed to Before me this 20 day of March 2001

s/ Ruth Riteloty
Ruth Riteloty esq.
ATT At Law
New Jersey

ABLE COPY

APPENDIX G

Rylak & Gianos
Law Offices
Alert D. Rylak P.O. Box 5365
William J. Gianos Clinton New Jersey 08809
Mark W. Phillips (908)-735-4126 Fax: (908) 735-2017

January 27, 1997

Mr. John P. Green
69 Duclos Lane
Edison NJ 08817

Re: State of New Jersey vs. Green

Dear Mr. Green:

As I told you by telephone the matter that you are charged with is not a criminal offense and therefore, we are allowed to charge for discovery. When you forward the $25.00 payable to "Rylak and Gianos", will get you the discovery to which you are entitled to under the applicable rules of court and the applicable cases.

Sincerely,
By: S/ William J Gianos
WILLIAM J. GIANOS ESQUIRE
WJG:jt

cc: Chief Smith, Frenchtown Police w/encl

APPENDIX H

John Green
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Edison NJ 08817
(732) 572-6273
Pro se

ORIGINAL FILED
APR 25 2000
WILLIAM T. WALSH CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
NEWARK DIVISION

DOCKET NO. 00-1959 (AET)

JOHN GREEN

Plaintiff,

v.

CIVIL ACTION

JURY DEMANDED

William Gianos, Albert Rylak, Jeffery Martin,
Law firm of Rylak & Gianos and Stephen Rubin
Defendants,

JURISDICTION

1. This action is brought pursuant to 42 U.S.C. Sec. 1983, 1986 and 1988 and the Fifth Fourteenth Amendments. Jurisdiction is founded on 28 U.S.C. Sec. 1331 and 1343(1)(2)(3)(4) and the aforementioned statutory and Constitutional provisions. Plaintiff further invokes the pendent jurisdiction of this Court to consider claims arising under state law.

PARTIES

2. Plaintiff John Green is a citizen of the United States and a resident of the State of New Jersey.

3. Defendant Jefferey M. Martin was the Municipal Judge of Frenchtown during the time of the violations of Green's rights
4. Defendant William Gianos, of the law firm of Rylak and Gianos. At the time of the violations of Green's rights, Mr. Gianos was one of the Frenchtown Municipal Prosecutors.
5. Defendant Stephen Rubin, at the time of the violations of Green's rights. Mr. Rubin was the Hunterdon County Prosecutor.
6. Defendant Rylak, of the law firm of Rylak and Gianos. At the time of the violations of Green's rights, Mr. Rylak was one of the Frenchtown Municipal Prosecutors.
7. Defendant Rylak & Gianos, is the law firm that employed Mr. Rylak and Mr.Gianos.

FIRST CAUSE OF ACTION

8. On or about, Jan 14, 1997, Green was issued a summon in the municipality of Frenchtown for speeding.
9. On or about, Jan 19, 1997, Green made a written request to the municipal prosecutor for discovery.
10. On or about, January 27, 1997, Mr. Gianos wrote Green back demanding that he pay Mr. Gianos law firm $25.00 for any discovery requested.
11. On or about, January 28, 1997, Green replied to Mr. Gianos and refused to pay this fee requested . Green also told Mr. Gianos that Green would be filing a Civil rights action against him. Mr. Gianos never answered.
12. On or about, March 12, 1997, a hearing was held in the Frenchtown Municipal Courthouse. Judge Martin, Mr. Green and the Prosecutor Mr. Gianos.
13. On or about, March 12, 1997, during this hearing in municipal Court, Mr. Gianos, acting in the interest of himself and the law firm of Rylak & Gianos, refused to

allow the Court to make copies of the items of Discovery and give them to Green, unless Green would sign a waiver to give up any civil actions against Mr. Gianos for violations of his due process rights.

14. On or about, March 12, 1997, Green refused to sign any waiver and Mr. Gianos refused to allow the Court to make copies of the documents of discovery for Green.
15. On or about, March 12, 1997, Mr.Gianos, acting under color of law violated Green's right to Due Process and a fair trial. Mr. Gianos stepped out of the role of Prosecutor at this time and was acting in the role of an individually attempting to shield himself and his law firm from a civil against. And demanding money for himself personally from Green.
16. On or about, March 12. 1997, Mr. Gianos violated Mr. Green's Constitutional rights, Fifth and fourteenth amendments, under the color of law.
17. As a result of Mr. Gianos's actions Green could not prepare a defense and Green was found guilty on September 9, 1998.
18. On January 19, 2000, the New Jersey Superior Court, Appellate Division found Green was not guilty of the offence charged.
19. On January 19, 2000, the New Jersey Superior Court, Appellate Division found that Green's right to discovery was violated.
20. On January 19, 2000, the New Jersey Superior Court, Appellate Division found there was no authority for a fee for discovery.
21. Mr. Gianos is being sued individually and in his official capacity.

SECOND CAUSE OF ACTION

22. The allegations set forth in paragraphs 1 to 21 inclusive are incorporated herein as if fully set forth.
23. As a result of Mr. Gianos unlawfully withholding discovery from Mr. Green, Mr. Green was unable to

prepare a proper defendant for the charges against himself and this resulted in a guilty verdict against Green on September 9, 1998.

24. Green suffered great emotion stress and pain knowing that he could not prepare a defense for the charges against him. And Green was subject to the Court all this time and not free to go about his normal business.
25. Mr. Gianos actions were willful, wanton and malicious and under color of law.
26. Mr. Gianos intentionally inflicted great emotional distress and pain on Green.
27. Mr. Gianos is being sued individually and in his official capacity.

THIRD CAUSE OF ACTION

28. The allegations set forth in paragraphs 1 to 27 inclusive are incorporated herein as if fully set forth.
29. Green suffered great emotion stress and pain knowing that he could prepare a defense for the charges against him. And Green was subject to the Court all this time and not free to go about his normal business.
30. Mr. Gianos because of the above actions negligently great emotional distress and pain, under color of law, on Green.
31. Mr. Gianos is being sued individually and in his official capacity.

FOURTH CAUSE OF ACTION

32. The allegations set forth in paragraphs 1 to 31 inclusive are incorporated herein as if fully set forth.
33. On or about, October 30, 1997, the Court because of the conflict of interest replaced Mr.Gianos with his law partner Mr. Rylak.
34. On or about, February 3, 1998, a hearing was held on a Motion for dismissal, filed by Green. Part of this motion

involved the discovery issue and the continued conflict of interest because the new prosecutor is a partner of the same law firm as the one dismissed for conflict of interest in this case.

35. Mr. Rylak again demanded his law firm, not the state, $25.00 before he would provide discovery.
36. Mr. Rylak attempted to enrich himself, his law partner and his private firm. Under color of law Mr. Rylak violated Green's due process rights.
37. Mr. Rylak is being sued individually and in his official capacity.

FIFTH CAUSE OF ACTION

38. The allegations set forth in paragraphs 1 to 38 inclusive are incorporated herein as if fully set forth.
39. As a result of Mr. Rylak unlawfully withholding discovery from Mr. Green, Mr. Green was unable to prepare a proper defendant for the charges against himself and this resulted in a guilty verdict against Green on September 9, 1998.
40. Green suffered great emotion stress and pain knowing that he could prepare a defense for the charges against him. And Green was subject to the Court all this time and not free to go about his normal business.
41. Mr. Rylak actions were willful, wanton and malicious and under color of law..
42. Mr. Rylak intentionally inflicted great emotional distress and pain on Green.
43. Mr. Rylak is being sued individually and in his official capacity.

SIXTH CAUSE OF ACTION

44. The allegations set forth in paragraphs 1 to 44 inclusive are incorporated herein as if fully set forth.
45. Mr. Rylak, because of the above actions negligently great

emotional distress and pain, under color of law, on Green.

46. Green suffered great emotion stress and pain knowing that he could prepare a defense for the charges against him. And Green was subject to the Court all this time and not free to go about his normal business.
47. Mr. Rylak is being sued individually and in his official capacity.

SEVENTH CAUSE OF ACTION

48. The allegations set forth in paragraphs 1 to 48 inclusive are incorporated herein as if fully set forth.
49. Jeffrey Martin, Judge of Frenchtown Municipal Court was presented with Case Law, Rule of the Court, and New Jersey Statue to show that Green was entitled to discovery in the case before the Court.
50. Judge Martin ruled that Green had to deal with a private law firm, not the state, to obtain discovery.
51. Judge Martin ruled that Green had to pay a private firm for discovery.
52. Jeffrey Martin clear intent was to unjustly enrich a private law firm.
53. Jeffrey Martin gave control of property of the state to a private law firm for their unjust enrichment.
54. Jeffrey Martin operated without authority under the law to rule in a civil matter on a discovery fee.
55. Judge Martin acted in clear absence of jurisdiction, and under color of law.
56. Judge Martin under color of law violated Green's Due Process rights.
57. Mr. Jeffrey Martin is being sued individually and in his official capacity.

EIGHTH CAUSE OF ACTION

58. The allegations set forth in paragraphs 1 to 58 inclusive are incorporated herein as if fully set forth.

59. As a result of Mr. Martin unlawfully turned over the state's property to a private law firm to use for their enrichment, Mr. Green was unable to prepare a proper defendant for the charges against himself and this resulted in a guilty verdict against Green on September 9, 1998.

60. Green suffered great emotion stress and pain knowing that he could prepare a defense for the charges against him. And Green was subject to the Court all this time and not free to go about his normal business.

61. Mr. Martin's actions were willful, wanton and malicious and under color on law.

62. Mr. Martin intentionally inflicted great emotional distress and pain on Green.

63. Mr. Martin is being sued individually and in his official capacity.

NINTH CAUSE OF ACTION

64. The allegations set forth in paragraphs 1 to 64 inclusive are incorporated herein as if fully set forth.

65. Green suffered great emotion stress and pain knowing that he could prepare a defense for the charges against him. And Green was subject to the Court all this time and not free to go about his normal business.

66. Mr. Martin because of the above actions negligently great emotional distress and pain, under color of law, on Green.

67. Mr. Martin is being sued individually and in his official capacity.

TENTH CAUSE OF ACTION

68. The allegations set forth in paragraphs 1 to 68 inclusive are incorporated herein as if fully set forth.

69. On or about June 10, 1998, a hearing was held on a motion to dismiss for lack of prosecution, Green filed this motion.

70. Mr. Gianos, the prosecutor that was dismissed from this case, showed up to argue against Green's motion.
71. Mr. Gianos was no longer the prosecutor in this case and acted without authority, was not at this time part of the judicial process, and operated under color of law.
72. Mr. Gianos violated Green's rights by malicious prosecution and malicious use of process.
73. Mr. Gianos is being sued individually and in his official capacity.

ELEVENTH CAUSE OF ACTION

74. The allegations set forth in paragraphs 1 to 74 inclusive are incorporated herein as if fully set forth.
75. Green suffered great emotion stress and pain because of malicious prosecution and malicious use of process.
76. Mr. Gianos's actions were willful, wanton and malicious and under color of law.
77. Mr. Gianos intentionally inflicted great emotional distress and pain on Green.
78. Mr. Gianos is being sued individually and in his official capacity.

TWELFTH CAUSE OF ACTION

79. The allegations set forth in paragraphs 1 to 79 inclusive are incorporated herein as if fully set forth.
80. Green suffered great emotion stress and pain because of malicious prosecution and malicious use of process.
81. Mr. Gianos because of the above actions negligently great emotional distress and pain, under color of law, on Green.
82. Mr. Gianos is being sued individually and in his official capacity.

THIRDTEENTH CAUSE OF ACTION

83. The allegations set forth in paragraphs 1 to 83 inclusive are incorporated herein as if fully set forth.

84. Mr. Rylak and Mr. Gianos are employees of the law firm of Rylak & Gianos.

85. The law firm is responsible for the actions of Mr. Rylak and Mr. Gianos on all the above actions with their names in it.

FOURTEENTH CAUSE OF ACTION

86. The allegations set forth in paragraphs 1 to 86 inclusive are incorporated herein as if fully set forth.

87. Mr. Rubin is the Hunterdon County Prosecutor and is responsible for the action of the Municipal Prosecutors under him.

88. Mr. Rubin was informed by letter on March 5, 1997, that Mr. Gianos was demanding money be privately paid to the law firm of Rylak & Gianos for state property(discovery documents).

89. Mr. Rubin failed to supervise Mr. Gianos and Mr. Rylak.

90. Mr. Rubin failed to correct the unconstitutional practice and conditions complained about in this complaint.

91. As a result of Mr. Rubin's failure to act, Mr. Green was unable to prepare a proper defendant for the charges against himself and this resulted in a guilty verdict against Green on September 9, 1998.

92. Mr. Rubin was acting under color of law.

93. Mr. Rubin is being sued individually and in his official capacity.

FIFTEENTH CAUSE OF ACTION

94. The allegations set forth in paragraphs 1 to 94 inclusive are incorporated herein as if fully set forth.

95. Green suffered great emotion stress and pain because Mr. Rubin's failure to properly supervise Mr. Gianos and Mr. Rylak.

96. Mr.Rubin, because of the above actions negligently great emotional distress and pain, under color of law, on Green.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands the following relief, jointly, and severally against all the defendants.

1. A declaratory judgment that the policies, practices, and acts complained of herein are illegal and unconstitutional.
2. Compensatory damages for plaintiff, John Green in the amount of $1540.00 for lost income cause by the above actions of the defendants.
3. Punitive damages for plaintiff, John Green in the amount of $2,000,000.00
4. Such other and further relief as this Court may deem appropriate, including cost and reasonable attorney's fees.
5. A jury trial is demanded.

S/ John Green

John Green DATED April 25, 2000

Supreme Court, U.S.
FILED
OCT 15 2002
OFFICE OF THE CLERK

No. 02-410

In The Supreme Court of the United States

JOHN GREEN,

Petitioner,

v.

WILLIAM GIANOS, ALBERT RYLAK, JEFFREY MARTIN, LAW FIRM OF RYLAK & GIANOS AND STEPHEN RUBIN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

Pursuant to United States Supreme Court Rule 15, Respondents William Gianos, Albert Rylak, Jeffrey Martin, Law Firm of Rylak & Gianos, and Stephen Rubin, hereby submit this Brief in Opposition to the Petition for a Writ of Certiorari.

COUNTER-STATEMENT OF THE CASE

Respondents respectfully ask that this Court consider the following Counter-Statement of the Case.[1]

At the time of the subject dispute, William J. Gianos, Esq. and Albert D. Rylak, Esq. (hereinafter "Mr. Gianos" and "Mr. Rylak", respectively) were municipal prosecutors, as well as partners in a private practice, the Law Firm of Rylak & Gianos.

Mr. Gianos and Mr. Rylak's procedure for providing discovery to municipal defendants was the same as any other New Jersey municipal prosecutors they knew. *See* Petitioner's Appendix at 28A-30A. Upon receipt of a twenty-five dollar ($25.00) administrative fee, they provided defendants any permissible discovery requested. In fact, Respondents were personally aware that prosecutors in other New Jersey municipalities often charged a higher fee than they did. *Id.*

[1] The facts conferred herein were thoroughly presented to the district court and Third Circuit.

Until 2001, the New Jersey Court Rules did not address whether prosecutors could charge a fee for providing discovery in municipal cases.[2] Thus, the Rules Mr. Gianos and Mr. Rylak referred to for guidance did not suggest there was anything improper about their discovery practice. Moreover, since most municipal prosecutors are also local practicing attorneys, it is only logical the cost associated with providing a defendant discovery is going to be borne by these private attorneys. In this regard, the $25.00 discovery charge was in no way intended to place a burden on municipal defendants. Rather, it provided reimbursement for time expended and copying costs incurred by the Law Firm of Rylak & Gianos as a result of supplying discovery. *See* Pet. App. 30A-31A.

Finally, the New Jersey Appellate Division acknowledged the prevalence of administrative discovery fees in *State v. Green*, 327 N.J. Super. 334 (App. Div. 2000). The Court stated: "[W]e have a sense that the heart of the contention, the $25 administrative fee, may be the rule rather than the exception." *Id.* at 342.

After receiving a summons for traveling fifty-one (51) miles per hour in a twenty-five (25) mile per hour school zone, John Green (hereinafter "Mr. Green") requested a large quantity of discovery from Mr. Gianos. Specifically, Mr. Green requested:

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[2] Since 2001, the Comment to New Jersey Court Rule 7:7-7, citing *State v. Green*, 327 N.J. Super. 334 (App. Div. 2000), provides: "[N]o fee other than a per-page copying fee may be imposed as a condition for complying with a discovery demand . . ."

> (1) all documents Mr. Gianos intended to use to prove the speed limit had been legally set on Harrison Street (where Mr. Green was issued the speeding ticket); (2) the arresting officer's log book for the date of the incident; (3) both sides of the officer's ticket; (4) a description of the device used to measure the speed of Mr. Green's vehicle, the record of when this device was calibrated, and its maintenance and repair history; (5) the calibration slip for the tuning forks used to calibrate the radar unit; and (6) the officer's training record on the radar device.

See Respondents' Appendix at 1A-4A.[3]

Mr. Gianos informed Mr. Green that all documents relevant to the ticket would be provided upon payment of $25.00 to cover the administrative cost associated with locating, compiling and copying this voluminous discovery.

Without making a claim of insolvency, Mr. Green refused to pay this fee.

On March 12, 1997, an initial hearing regarding the speeding ticket was held in Frenchtown Municipal Court before the Honorable Jeffrey M. Martin, J.M.C. (hereinafter "Judge Martin"). Mr. Green alleged he had been denied discovery and threatened a civil suit against Mr. Gianos.

In an effort to help both parties resolve this dispute amicably, Judge Martin *suggested* photocopies of the relevant documents be made for Mr. Green at the court in

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[3] Respondents' Appendix, identified as pages 1A-35A, is annexed to the end of this Brief.

exchange for a release not to sue Mr. Gianos.[4] However, Mr. Green refused to sign a release or pay for discovery.

Moreover, even though the good faith efforts of Mr. Gianos and Judge Martin failed to resolve this dispute, at the March 12, 1997 hearing, Mr. Green was permitted to view all discovery the State intended to use in its prosecution. *See* Resp. App. 5A-7A.

Mr. Green's trial took place eighteen (18) months later on September 9, 1998. Thus, having viewed the State's evidence, Mr. Green clearly had ample time to prepare his defense. Although Mr. Green was convicted of speeding, that judgment was overturned by the New Jersey Superior Court, Appellate Division.

Nonetheless, Mr. Green subsequently filed a civil suit in federal court against Mr. Gianos, Mr. Rylak, the Law Firm of Rylak & Gianos, Judge Martin, and the Honorable Stephen B. Rubin (hereinafter, occasionally referred to collectively as "Defendants"), who at the time of the dispute was Hunterdon County Prosecutor.

In dismissing Mr. Green's civil suit on summary judgment, the district court ruled that although Mr. Green may have been somewhat limited in his access to information he deemed important, enforcement of the discovery fee by Mr. Gianos and Mr. Rylak did not deny him an opportunity to be heard. *See* Pet. App. 19A.

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[4] Petitioner's Brief misleadingly implies that Judge Martin conditioned any provision of discovery on the signing of a release. *See* Petition at 3.

The Third Circuit Court of Appeals clearly agreed with this reasoning. *See* Pet. App. 8A.

Respondents further note that Mr. Green filed a petition for panel and *en banc* rehearing, which was denied in both regards by the Third Circuit.

Instead of directly challenging the constitutional basis of these lower court holdings, Mr. Green's Petition attempts to divert this Court's attention by focusing on moot and ancillary issues: whether future municipal defendants will be denied a fair trial; the amount of additional guidance a *pro se* litigant should be afforded when responding to a summary judgment motion; and whether discovery ended too soon.

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

I.

SINCE THE LOWER COURTS' RULINGS WERE IN ACCORD WITH PRECEDENT ESTABLISHED BY THIS COURT IN *SIEGERT V. GILLEY*, 500 U.S. 226 (1991), REVIEW IS NOT WARRANTED.

This Court has unequivocally determined the framework for determining whether a plaintiff's allegations are sufficient to overcome a defendant's defense of qualified immunity asserted in a motion for summary judgment. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Gomez v. Toledo*, 446 U.S. 635 (1980).

In this regard, *Harlow* held: "On summary judgment, the judge appropriately may determine, not only the

currently applicable law, but whether that law was clearly established at the time an action occurred . . ." *Id.* at 818.

Referring to the holding in *Harlow*, this Court later added in *Siegert v. Gilley*, 500 U.S. 226 (1991):

> A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of *whether the plaintiff has asserted a violation of a constitutional right at all.*
>
> Decision of this *purely legal question* permits courts expeditiously to weed out suits which fail the test without requiring a defendant who rightly claims qualified immunity to engage in expensive and time consuming preparation to defend the suit on its merits.
>
> One of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long, drawn-out lawsuit. (emphasis added)

Id. at 232.

It is clear in the case at bar that both the district court and the Third Circuit determined Mr. Green did not establish a violation of a constitutional right.

Before addressing Defendants' summary judgment argument concerning qualified immunity, the district court held:

> [T]he Court *declines to find that the enforcement of the twenty-five dollar fee amounts to a constitutional violation.* (emphasis added)

See Pet. App. 19A. The district court's reasoning in this regard was that Defendants' insistence on the fee did not "so infect the proceedings with unfairness" as to violate the basic tenants of due process. Citing *Mathews v. Eldridge*, 424 U.S. 319 (1976), the court concluded that although Plaintiff was somewhat limited in his access to discovery he may have personally deemed important, enforcement of the $25.00 discovery fee did not deny plaintiff the opportunity to be heard in a "meaningful manner".

The Third Circuit's opinion also cited *Mathews*, and settled:

> We agree with the District Court that, although [Plaintiff] was somewhat limited in his access to information he believed was relevant to his defense of the speeding ticket, the refusal to provide copies at a reasonable cost of all items requested in discovery did not deny him the opportunity to be heard in a meaningful manner. This possible violation of the state court rules of discovery *does not amount to a federal constitutional violation*. (emphasis added)

See Pet. App. 8A.

Petitioner contends the district court and Third Circuit inappropriately relied on *Mathews*.

In *Mathews*, this Court held that due process is a concept which is not unrelated to time, place and circumstances, and thus established a balancing test to determine whether procedural due process requirements have been satisfied. *Id.* at 334-335.

Petitioner argues this balancing test was only intended to be used in an administrative law context, not a

criminal context, which he alleges was the nature of the speeding charge against him. He therefore reasons that the lower courts were incorrect to have applied the *Mathews* balancing test.

First, it is clear that neither the district court nor the Third Circuit applied, or even cited, *Mathews*' balancing test. They merely alluded to *Mathews* for the proposition that "the fundamental requirement of due process is the opportunity to be heard . . . in a meaningful manner." *Id.* at 333; Pet. App. 8A,19A.

Furthermore, contrary to Mr. Green's assertion, under New Jersey law traffic violations are only "quasi-criminal" in nature. *See State v. Zucconi*, 93 N.J. Super. 380, 388-392 (App. Div. 1967) (holding that Miranda rules with respect to implementation of rights to counsel and against self-incrimination did not apply in "quasi-criminal" traffic offense context).

Petitioner also contends the lower courts' rulings that a possible violation of state discovery rules does not amount to a federal constitutional violation conflicts with a Ninth Circuit holding.

In this regard, Petitioner cites *Jackson v. Gates*, 975 F.2d 648 (9th Cir. 1992) for the proposition that "a policy itself need only cause a constitutional violation; it need not be unconstitutional *per se*." *Id.* at 654. However, beyond citing this language, Petitioner offers no elaboration on how the lower court decisions in the present case conflict with *Jackson*.

In fact, it is evident that the cited language does not illustrate a conflict. The crux of this quotation is that a policy may cause a constitutional violation without the

policy itself being *per se* unconstitutional. The district court's ruling, which the Third Circuit unequivocally affirmed, was that Defendants' actions in demanding a $25.00 discovery fee *did not cause a constitutional violation*.

Accordingly, Respondents respectfully submit that this case does not merit Supreme Court review.

II.

PETITIONER'S FIRST ARGUMENT WHY THIS COURT SHOULD GRANT CERTIORARI IS ENTIRELY WITHOUT MERIT.

In a transparent attempt to grab this Court's attention, Petitioner argues that his case occasions an issue of "great public importance". *See* Pet. 8.

In this regard, Petitioner avers that without this Court's intervention, municipal prosecutors will continue to impose administrative discovery fees, and that these fees will vary among municipalities depending on the prosecutors' personal motives.

As explained in Point A, *infra*, this contention is moot.

Moreover, the record below clearly illustrates that Mr. Gianos and Mr. Rylak did not demand a $25.00 fee from Mr. Green in order to further a personal interest. Rather, this charge was to cover the anticipated administrative expenses to their private firm associated with providing Mr. Green's discovery.

Mr. Gianos and Mr. Rylak's reasonable belief that their demand was appropriate, as demonstrated by the record below, supports the district court's decision concerning qualified immunity.

Finally, Petitioner has failed to present a legitimate argument that the district court's decision in this regard conflicted with applicable precedent.

A. Petitioner's Claim That, Absent This Court's Intervention, Municipal Prosecutors Will Deny Future Defendants the Right to a Fair Trial and Equal Protection, is Moot Since the Current New Jersey Court Rules Expressly Address the Imposition of Discovery Fees in Municipal Matters.

Petitioner misleadingly contends:

> This [C]ourt should grant this petition for certiorari [sic] this is a matter of great public importance... If this decision stands it would mean that we continue with municipal prosecutors setting fees at whatever they want, fees that they have a personal interest in, because it goes into their private pockets. The fees would vary from town to town, depending on what town you were charged in, and the lifestyle the prosecutor wanted to maintain.

See Pet. 8.

Referral to the 2002 and 2003 New Jersey Court Rules demonstrates that Petitioner's argument in this regard is moot.

The Comment to New Jersey Court Rule 7:7-7 states: "[N]o fee other than a per-page copying fee may be

imposed as a condition for complying with a discovery demand . . ."[5]

Therefore, Petitioner is arguing an issue which has already been addressed, and thus preempted, by the New Jersey Supreme Court and Administrative Office of the Courts of New Jersey.[6] By providing that only a per-page copying fee may be charged for discovery in municipal cases, the current New Jersey Court Rules expressly prohibit municipal prosecutors from charging any fee they wish.

Accordingly, Respondents respectfully submit that this issue is moot and does not merit Supreme Court review.

B. The Record Below Clearly Demonstrates That Mr. Gianos and Mr. Rylak Did Not Demand an Administrative Discovery Fee in Order to Further a Personal Interest.

Petitioner claims Mr. Gianos and Mr. Rylak demanded a $25.00 discovery fee in order to raise money for their private law firm.

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[5] As will be discussed more fully in Point B, *infra*, the Comment to this Rule does not impact Defendants' entitlement to qualified immunity because Plaintiff's dispute arose in 1997 and his speeding trial was in 1998. Both the 1997 and 1998 Comments pertaining to municipal discovery make no mention of discovery fees. It is undisputed that Mr. Gianos and Mr. Rylak were, at all relevant times, guided by the 1997 and 1998 New Jersey Court Rules.

[6] These are the entities responsible for formulation and approval of the New Jersey Court Rules.

Although the New Jersey Court Rules applicable at the time of the dispute did not expressly authorize charging a fee for discovery, they did not expressly prohibit this charge either. In fact, the Rules made no mention of discovery fees in municipal cases. *See* 1997 and 1998 New Jersey Court Rules.

Moreover, the record below clearly illustrates that Mr. Gianos and Mr. Rylak had personal knowledge that prosecutors in numerous other New Jersey municipalities engaged in the same practice, and often set their fixed charge at a higher rate.

In this regard, Mr. Gianos and Mr. Rylak each certified the following in affidavits that were submitted in support of Defendants' summary judgment motion in district court:

> Based on my understanding that some years ago the New Jersey Supreme Court determined all discovery would be handled through the Prosecutor's Office, I adopted the process utilized by every prosecutor I know, which is to charge for discovery.
>
> Moreover, I adopted this procedure with the knowledge that I must provide discovery in accordance with New Jersey Court Rules, and that such Rules did not [at the time] expressly prohibit charging a discovery fee.
>
> The fee I charged for the provision of discovery was a flat administrative fee of twenty-five dollars ($25.00). I have always considered this a fair fee since I am personally aware prosecutors for

> the following New Jersey municipalities charge a higher amount: (14 municipalities are listed).

See Pet. App. 28A-30A.

Additionally, these affidavits explained that since most municipal prosecutors are also local practicing attorneys, absent reimbursement for the expenses of providing discovery, such costs would have to be borne by these attorneys and their firms. *See* Pet. App. 30A.

Unlike attorneys from the County Prosecutor's Office, a municipal prosecutor is not appointed a secretarial staff to handle discovery requests. As a result, this administrative work is usually performed by secretaries from the prosecutor's own practice. *Id.*

Finally, these private law firms often bear the additional financial burden of having to pay local police departments for their copying costs and the like.[7] *Id.*

Respondents would also like to address the Supreme Court case Petitioner cites as precedent that a constitutional issue is raised when a prosecutor has a personal interest in litigation before him.

In this regard, Petitioner cites *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980) for the proposition that "[a]

---

[7] Plaintiff asked for discovery items that, while not unusual or necessarily unfair requests, were in the possession of the police department. These items included, but were not limited to, the arresting officer's log book for the date Plaintiff was issued a speeding summons, and the officer's training record on the radar device. It is likely procurement of this discovery would have cost Mr. Gianos and Mr. Rylaks' private law firm both time and money.

scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision *and in some contexts* raise serious constitutional questions." (emphasis added) *Id.* at 249-250.

In *Marshall*, an employer brought a federal action challenging a provision of the Fair Labor Standards Act that provided money collected as civil penalties for employment of child labor was to be returned to the Department of Labor to reimburse the cost of investigating the violation.

This case, while seemingly analogous to the case at bar in that it involved reimbursement of a prosecutorial entity for the procedural aspects of its work, is clearly distinguishable in a crucial respect.

The plaintiff claimed the Fair Labor Standard Act's reimbursement provision created an impermissible risk of bias because a greater effort by a regional Department of Labor office to uncover violations would increase the amount of penalties assessed, thus increasing the reimbursements for that office. *Id.* at 238.

However, this Court stated:

> . . . we need not say with precision what limits there may be on a financial or personal interest of one who performs a prosecutorial function, for here the influence alleged to impose bias is exceptionally remote. No government official stands to profit economically from vigorous enforcement of the [procedure at issue].

Id. at 250.

In the case at bar, the potential for bias clearly was even more remote. As explained, the diminutive fee Mr. Gianos and Mr. Rylak received for providing discovery was reimbursement for the necessary administrative costs incurred by their private law firm.

It is axiomatic that receipt of $25.00 for this purpose would not have prompted Mr. Gianos and Mr. Rylak to increase their prosecutorial efforts. They only prosecute those individuals issued a summons by a police officer in a municipality they serve.

In this regard, Mr. Gianos and Mr. Rylak have no connection to, or influence upon, a police officer's decision to issue a summons. They are simply forwarded a copy of the summons once it has been issued. It is the police officer who has the discretion whether or not to issue a particular summons.

Therefore, there is not even arguably an appearance of impropriety raised by their discovery procedure.

Accordingly, Respondents respectfully submit that this Court's review is not warranted.

C. Petitioner Has Failed to Present a Legitimate Argument That the District Court's Decision Concerning Qualified Immunity Conflicted With Applicable Precedent.

Petitioner's sole argument challenging the district court's qualified immunity holding is that the Third Circuit did not address the issue. According to Petitioner, the Third Circuit's decision in this regard reveals that it disagreed with the district court.

This argument is not only disingenuous, it is misleading. A full reading of the Third Circuit's opinion leaves no doubt that the Court chose not to discuss qualified immunity because it was an unnecessary step in its analysis.

As discussed in Point I, *supra*, the Third Circuit agreed with the district court that the possible violation of state court rules of discovery in this matter does not amount to a federal constitutional violation.

Pursuant to Supreme Court precedent, this legal finding ended the inquiry and entitled Defendants to judgment as a matter of law. *See Siegert*, 500 U.S. at 232.

Thus, Petitioner's assumption that the Third Circuit's silence demonstrated disagreement with the district court's holding is without merit.

Furthermore, this assumption highlights Petitioner's failure to present a legitimate argument that the district court's decision concerning immunity conflicts with valid precedent.

The district court in fact supported its qualified immunity decision with unequivocal Supreme Court precedent. It cited *Anderson v. Creighton*, 483 U.S. 635 (1987) for the principle that qualified immunity is available if "a reasonable [official] would have believed [his or her] actions to be lawful, in light of the clearly established law and the information the . . . [official] possessed." *Id.* at 641.

The district court found that "there appears to be no law prior to this incident even suggesting that [an administrative discovery] fee was improper, much less clearly establishing the impropriety of such a fee." *See* Pet. App. 20A.

The court did not end its inquiry here. It examined the subjective element of qualified immunity as mandated by *Gomez v. Toledo*, 446 U.S. 635 (1980). This Court held in *Gomez* that the qualified immunity "test focuses not only on whether the official has an objectively reasonable basis for [his] belief, but also whether '[t]he official himself [is] acting sincerely and with a belief that he is doing right. . . . '" *Id.* at 641 (quoting *Wood v. Strickland*, 420 U.S. 308, 321 (1975)).

In this regard, the district court determined that Mr. Gianos and Mr. Rylak's knowledge of the prevalence of fixed discovery fees in other New Jersey municipalities "suggests [they] believed the administrative fee was proper." *See* Pet. App. 20A.

The district court's findings on this issue are entirely consistent with the record below. *See* Pet. App. 28A-31A; and footnote 5.

Accordingly, Respondents respectfully submit that this case does not merit review.

III.

PETITIONER'S ARGUMENT THAT THE DISTRICT COURT FAILED TO INSTRUCT HIM ON THE PROCEDURE FOR ANSWERING DEFENDANTS' SUMMARY JUDGMENT MOTION IS WITHOUT MERIT.

Petitioner claims various other Circuits have ruled that *pro se* litigants should be provided extra guidance by a district court when served with an adversary's summary judgment motion.

In this regard, essentially two arguments are presented.

First, Petitioner alleges he was not informed that his summary judgment opposition brief needed to address his emotional distress claim, in light of the fact that Defendants' moving brief did not do so.

Second, Petitioner contends Respondents did not request dismissal of any State actions in their motion, and thus he again was unaware he had to address the same.

At the outset, Petitioner does not provide any evidence that the Third Circuit has ruled *pro se* litigants should be given special guidance by a district court on summary judgment procedure.

More importantly, concerning the first issue, Respondents' district court summary judgment motion requested dismissal, with prejudice, of "any and all claims made by Plaintiff." Thus, Petitioner was provided with clear notice that Defendants' motion was challenging all his claims.

Moreover, the district court afforded Petitioner additional time to submit his summary judgment opposition after he complained to the judge in writing that he was not sure he completely understood Federal Rule of Civil Procedure 56. *See* Resp. App. 8A-9A.

Finally, Petitioner's second argument is untrue. Defendants' brief in fact called for dismissal of Mr. Green's action based upon two different State grounds.

First, Defendants argued that in addition to qualified immunity under federal law, they were afforded immunity by the New Jersey Tort Claims Act, N.J.S.A. 59:1-1, *et seq.*

Second, Defendants argued that Mr. Green had not made the factual showing required to support his malicious prosecution claim. *See* Resp. App. 26A-27A, 30A-32A. In fact, Mr. Green's summary judgment opposition responded to this argument at length.

Accordingly, Respondents respectfully submit that this case does not merit review.

IV.

HARLOW V. FITZGERALD, 457 U.S. 800 (1982) CLEARLY ILLUSTRATES DISCOVERY WAS NOT STOPPED TOO SOON.

Petitioner challenges the Third Circuit's holding that he was not entitled to discovery in this federal action because his complaint could have been dismissed for failure to state a claim.

In this regard, Petitioner claims that discovery he was seeking to compel at the time his case was dismissed by the district court would have provided evidence of official abuse that goes to the heart of 42 U.S.C. § 1983.

Petitioner cites *Monroe v. Pape*, 365 U.S. 167 (1961), in which this Court stated that 42 U.S.C. § 1983 was meant to provide a remedy to individuals deprived of a constitutional right by a government official's abuse of his position. *Id.* at 172.

As discussed in Point I, *supra*, both the district court and Third Circuit clearly ruled there was no constitutional violation.

Respondents also noted earlier in this Brief that *Harlow* held: on a summary judgment motion in which the

defendant has invoked qualified immunity, the judge may appropriately determine not only the applicable law, but whether that law was clearly established at the time of the alleged violation. *See Harlow*, 457 U.S. at 818.

Importantly, enunciation of this principle was followed by the explicit pronouncement:

> Until this threshold immunity question is resolved, *discovery should not be allowed*. (emphasis added)

Id.

Therefore, since pursuant to Supreme Court precedent Mr. Green was not entitled to continue discovery, Respondents respectfully submit that this case does not warrant review.

CONCLUSION

For all the foregoing reasons, Respondents respectfully pray that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

VICTOR A. ROTOLO, ESQ.
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ROTOLO ♦ MIDLIGE
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Clinton Township
Lebanon, New Jersey 08833
(908) 735-0330
Attorneys for Respondents, William Gianos, Albert Rylak, Honorable Jeffrey Martin, Law Firm of Rylak & Gianos and Honorable Stephen Rubin

DATED: October, 2002

APPENDIX

John P. Green
69 Duclos Lane
Edison NJ 08817
Pro-Se
908-572-6273

Town of Frenchtown

Plaintiffs, Summons and Complaint No. B 3284

Vs.

John Green

Defendants.

REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS

The Defendant, John Green, request pursuant to rules of the New Jersey Rule's Governing the courts. Please forward the documents and tangible things within 30 days after service of this request to John Green 69 Duclos Lane Edison NJ 08817.

DEFINITIONS AND INSTRUCTIONS

The term "documents" as used in this request is defined to include without limitation all original and non-identical copies of accounts, acknowledgments, advertisements, affidavits, agreements, appointment books, bills, bills of sale, calendars, charges, checks, client list, computer printouts, computer readable disks, contracts, correspondence, customer call records, customer lists, diaries, descriptions, drafts, files, income statements, insurance policies, insurance records and reports, inventories, invoices, journals, ledgers, letters, licenses, log books,

loose-leaf binders, messages, newspapers, notices, notes, orders, papers, photographs, policies, receipts, reports, Rolex cards, statements, tangible things, tape recordings, tax returns, telephone bills, telephone lists and logs, warranties, work orders and sheets, wrappers and writings.

The words "you" or "your" as used in this request shall be construed to mean any of the following: Town of Frenchtown, or any employee, agent or representative within the control of town of Frenchtown.

You shall produce original copies of all requested documents and copies thereof that bear any mark or notation not present on the original. In all cases where originals pr non-identical copies are not available, "document" or "documents" also mean identical copies of original documents and non-identical copies thereof.

The term "relates to" shall mean consist of, refer to, reflect or be in any way logically or factually connected with the matter discussed.

If you withhold any information on the ground that you contend it is privileged or otherwise protected from disclosure, state specifically the legal basis for withholding, state all facts which support your withholding; identify all persons receiving or having knowledge of any of the information; and identify all documents containing any of the information. If a claim of privilege is asserted with respect to any document, provide the above information, as well as: (a) author; (b) addressee; (c) distribute; (d) date; (c) type of document; (f) topic; (g) grounds and factual basic for assertion of privilege.

If any document described in any paragraph of this request for documents is no longer in your possession, custody or control, state whether it: (a) is missing or lost, (b) has been destroyed, (c) has been transferred voluntarily or involuntarily to others, or (d) has been disposed of through other means. In each instance, explain the circumstances surrounding such disposition, and identify the person directing or authorizing same, and the date thereof.

REQUEST

1. All documents or things relating to the establishment of the speed limit on Harrison St., time and date of town meeting to set limit, newspaper ads to inform public of the town meet, notice in newspapers of the establishment of sped limit on Harrison St., all documents that you intend to use to prove that the speed limit on Harrison St. Was legally set.

2. Copies of the arresting officers log books for his shift on Jan. 14, 1997.

3. Copies of Both sides of the arresting officer's copy of the tickets.

4. A description of the device used to measure my speed when it's was Calibrated and how, and it's maintenance and repair history.

5. Copy of Calibration slip for tuning forks use daily to Calibrate radar unit in the three speeds.

6. Copy of the Calibration of the police car's speedometer.

7. The officer's training records on that device, and his employment history.

DATED Jan 19 1997

John Green

JOINT COURT OF MILFORD
FRENCHTOWN, NEW JERSEY
HUNTERDON COUNTY

STATE OF NEW JERSEY	)	TRANSCRIPT
VS.	)	OF
JOHN P. GREEN	)	HEARING

PLACE: FRENCHTOWN MUNICIPAL BUILDING.

DATE: MARCH 12, 1997

BEFORE:

HONORABLE JEFFREY MARTIN, J.M.C.

TRANSCRIPT ORDERED BY: JOHN P. GREEN

APPEARANCES:

FOR THE STATE: WILLIAM GIANOS, ESQ.

FOR THE DEFENDANT: PRO SE

PRINTED WORDS
EMMA STORR CLOWES, CCT
123 PETTICOAT LANE
LEBANON, NEW JERSEY 08833

[20] I don't know what the ordinance or the thing with the county is setting the speed limit. I have not, I can't do no research without the proof (sic) I asked for. Give me the information, I'll pay for it, like I did in a letter to him.

THE COURT: Even though you objected, if there's a release here, do you object to doing it my way?

MR. GIANOS: No, Your Honor.

THE COURT: Okay. All right. So –

MR. GIANOS: But Your Honor, I want it on the record to state that we have present in court today everything that we will rely on to prosecute this case.

There's nothing additional that we are going to rely on to prosecute this case, other than what is sitting on the table to the right of me right now.

THE COURT: Okay.

MR. GIANOS: That's –

THE COURT: And that's what you're basically entitled to, sir. You're not entitled to what we call a fishing expedition for what they don't rely on.

JOHN P. GREEN: Well they rely –

THE COURT: Sir, if they fall short in what they say they need to prove their case –

JOHN P. GREEN: Right.

THE COURT: – then they fall short and they lose. But they don't have to supply what they say they don't need.

* * *

[23] I'm going to play this, rather than trying that, then I'll play it by the book too. Which is not to say – okay prosecutor, even though he's not happy with me – let's forget going through your office, let's just make the copies give the man his copies and set this case up for trial.

You don't want to do that?

JOHN P. GREEN: I'm happy to do that.

THE COURT: No, no sir. You're happy your way but not happy for the trade off.

JOHN P. GREEN: I am not –

THE COURT: I'm only happy with what I get, not with what I have to give.

JOHN P. GREEN: I –I won't sign a release.

THE COURT: Okay. Then you will not sign a release, then I'm not going to order it be done.

I'm going to reschedule this for trial. I will point out to you sir, that you've now – so that you're clear with what I'm saying – when you come back next time and you're still in this (inaudible), okay, I'm reminding you of two things – it was made available to you here in court and you've seen it and you could have had it by simply saying – I'll forget this thing about law suits – and I would have made you a copy.

JOHN P. GREEN: That is –

THE COURT: In my mind you've been given every opportunity for your discovery at this point. I'm going to give

* * *

John Green
69 Duclos Lane
Edison NJ 08817
732-572-6273
PRO-SE

April 5, 2001

Honorable Anne E. Thompson
United States Magistrate Judge
United States District Court (Filed Apr. 10, 2001)
Clarkson S. Fisher Federal Building &
Federal Courthouse
402 E. State Street
Trenton NJ 08608

Re: Green vs. Gianos, et als
Docket No.: CV-00-1959(AET)

[So Ordered Anne E. Thompson 4/9/01]

Dear Judge Thompson:

Thank you for your letter of April 3, 2001. I do ask for an adjournment to May 7, 2001 for a few reasons.

I did not receive the defendant's motion until March 26, 2001, by First Class Mail. I was a little confused about Federal Civil Rule 56(c), "The adverse party prior to the day of hearing may serve opposing affidavits." I mistakenly took this to mean any day.

Since I did receive this motion until late on March 26, 2001, and being a pro-se and not totally understanding Rule 56(c), I ask that I be given until April 30th 2001 to file my affidavit and brief.

I might also note that I have talked to Mr. Rotolo office on March 26, 2001 concerning the missing pages and mixed up affidavit in his appendix. I also faxed Mr. Rotolo today

a letter asking if he was going to correct his appendix or not. Depending what he does may change my brief.

On December 21, 2000, the defendants applied for an Extension of time to complete discovery, I did not oppose this and Judge Wolfson on January 16, 2001, granted their request. This is the first adjournment or extension that I have asked for.

I certify that I am fully familiar with the facts of this matter and that the statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Respectfully yours,

/s/ John Green
John Green
CC: Mr. Victor A. Rotolo by fax April 5, 2001

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WILLIAM GIANOS, ALBERT RYLAK, HONORABLE JEFFREY MARTIN, LAW FIRM OF RYLAK & GIANOS and HONORABLE STEPHEN RUBIN

Plaintiff(s), JOHN GREEN vs. Defendant(s), WILLIAM GIANOS, ALBERT RYLAK, JEFFREY MARTIN, LAW FIRM OF RYLAK & GIANOS AND STEPHEN RUBIN.	**UNITED STATES DISTRICT COURT DISTRICT OF NEW JERSEY** **Civil Action No. 001959(AET)**

BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

OF COUNSEL AND ON THE BRIEF:

Victor A. Rotolo, Esq.

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PRELIMINARY STATEMENT

Plaintiff's suit must fail because the crux of his claim revolves around the alleged inappropriateness of an administrative fee for discovery in municipal cases, when in fact, the imposition of such a fee is common practice among municipal prosecutors in New Jersey.

This case arises out of Plaintiff's refusal to pay an administrative fee to the Frenchtown, New Jersey Municipal Prosecutor for discovery concerning a speeding ticket he chose to contest.

After receiving a summons for traveling fifty-one (51) miles per hour in a twenty-five (25) mile per hour school zone, Plaintiff requested a large quantity of discovery from Mr. Gianos, Frenchtown Municipal Prosecutor. Specifically, Plaintiff requested:

> **(1) all documents Mr. Gianos intended to use to prove the speed limit had been legally set on Harrison Street (where Plaintiff had been issued the speeding ticket); (2) the arresting officer's log book for January 14, 1997; (3) both sides of the officer's ticket; (4) a description of the device used to measure Plaintiff's speed, when it was calibrated, and the maintenance and repair history; (5) the calibrations slip for the tuning forks used to calibrate the radar unit; and (6) the officer's training record on the radar device.** *See* Exhibit C.

Mr. Gianos informed Plaintiff all documents relevant to the ticket would be provided upon receipt of twenty-five dollars ($25.00) to cover the administrative cost associated with locating, compiling and copying this discovery.

Despite the volume of the request and the fact that charging such a diminutive flat fee for discovery is a common practice among municipal prosecutors in New Jersey, Plaintiff refused to pay.

On March 12, 1997, an initial hearing regarding the speeding ticket was held in Frenchtown Municipal Court before Judge Martin. Plaintiff alleged he had been denied discovery and threatened suit against Mr. Gianos.

In an effort to help both parties resolve this dispute amicably, Judge Martin suggested copies of the discovery documents be made for Plaintiff at the Court in exchange for a Release not to sue Mr. Gianos. However, Plaintiff refused to sign a release or pay for discovery.

Significantly, even though the good faith efforts of Mr. Gianos and Judge Martin failed to resolve this matter, Plaintiff did view all relevant discovery at the March 12, 1997 hearing.

The trial for Plaintiff's speeding ticket ultimately took place eighteen months later on September 9, 1999, at which time he was convicted of this offense. Thus, having viewed the State's evidence, Plaintiff had ample time to prepare his defense.

Plaintiff appealed this Municipal Court conviction to New Jersey Superior Court, Law Division, where it was defended by the Hunterdon County Prosecutor's Office. On *de novo* review, the Law Division affirmed the guilty finding.

On January 19, 2000, the Appellate Division overturned Plaintiff's speeding conviction because the State had not proven every element of the speeding offense beyond a reasonable doubt.

The Appellate Division briefly addressed the discovery fee dispute, but opted not to make any affirmative rulings on the issue. However, significantly, the Court expressly acknowledged the practice of charging an administrative discovery fee by stating:

> **[W]e have a sense that the heart of [Defendant's] contention, the $25.00 administrative fee, may be the rule rather than the exception.** *See* Exhibit G at page 342.

On April 25, 2000, Plaintiff filed a Complaint in Federal District Court alleging he had been deprived of his due process rights by Mr. Gianos, Mr. Rylak, Judge Martin, the Law Firm of Rylak and Gianos, and Mr. Rubin, the Hunterdon County Prosecutor.

For the following reasons, Defendants are entitled to judgment as a matter of law and Plaintiff's Complaint should, respectfully, be dismissed with prejudice:

(1) Plaintiff was not deprived of his due process rights because he viewed the discovery made available to him in accordance with New Jersey Court Rules;

(2) Mr. Gianos, Mr. Rylak, and Mr. Rubin are entitled to the affirmative defense of qualified immunity under Federal and State law because their actions were objectively reasonable and performed with subjective good faith;

(3) Judge Martin is entitled to absolute judicial immunity from liability for his alleged actions and/or inactions;

(4) Plaintiff's claim against Mr. Gianos and Mr. Rylak for malicious prosecution fails because he cannot

make a factual showing which supports his bare allegation these Defendants acted with malice; and

(5) since Mr. Gianos and Mr. Rylak are not liable for their alleged wrongful actions, the Law Firm of Rylak & Gianos, as a partnership, cannot be held liable.

STATEMENT OF FACTS

The material facts underlying Defendants' Motion for Summary Judgment are fully set forth in Defendants' attached Statement of Undisputed Facts submitted pursuant to Local Federal Practice Rule 56.1. For the sake of brevity, these facts will not be reiterated herein, but are incorporated and adopted by reference.

LEGAL ARGUMENT

POINT I

PLAINTIFF WAS PROVIDED DISCOVERY IN ACCORDANCE WITH NEW JERSEY COURT RULES AND THUS NOT DEPRIVED OF HIS DUE PROCESS RIGHTS.

In January, 1997, Mr. Gianos informed Plaintiff copies of all relevant discovery would be provided upon payment of a twenty-five dollar fee. Plaintiff refused to pay this fee.

Nevertheless, at the March 12, 1997 initial hearing, Mr. Gianos offered Plaintiff an opportunity to review this discovery.

In addition, Judge Martin, in a good faith effort to aid the parties in their discovery dispute, suggested copies be

made for Plaintiff in return for a signed Release promising not to sue Mr. Gianos.

Even though Judge Martin's suggestion was declined, Plaintiff did view the relevant discovery that was made available to him in accordance with New Jersey Court Rule 7:7-7(b).

New Jersey Court Rule 7:7-7(b) governs municipal practice and provides a defendant "shall be allowed to inspect, copy and photograph *or* be provided with copies and any relevant reports . . . within the custody of the prosecuting attorney." *R.* 7:7-7(b). (emphasis added)

Accordingly, it cannot be disputed that the mandate of Rule 7:7-7(b) was adhered to in this matter.

Furthermore, discovery relevant to a municipal prosecution will be in the possession of municipal prosecutors, who are almost always local practicing attorneys. Therefore, it is only logical the cost associated with providing this discovery is going to be borne by these private attorneys.

Moreover, there is no provision in the New Jersey Court Rules that directly addresses the imposition of discovery fees.[1] Thus, under applicable New Jersey Court

[1] Although the 2001 comments to New Jersey Court Rule 7:7-7 reference charging a per-page copying fee for discovery in municipal cases. Plaintiff's dispute arose in 1997 and his speeding trial was in 1998. Both the 1997 and 1998 comments pertaining to municipal discovery make no mention of discovery fees. Mr. Gianos and Mr. Rylak were, at all relevant times, guided by the 1997 and 1998 New Jersey Court Rules. Moreover, since the Appellate Division in *State v. Green* failed to make any affirmative rulings in regard to discovery fees, it

(Continued on following page)

Rules there was nothing improper about the Prosecutors' fee request.

Plaintiff was initially informed he could have copies of all discovery upon payment of the twenty-five dollar administrative fee. Plaintiff refused and never made any claim on insolvency. Plaintiff was then given an opportunity to copy all discovery at the March 12, 1997 hearing before Judge Martin. Plaintiff again refused.

Finally, Plaintiff was allowed to view all of the materials, which he did, at this hearing. Therefore, there can be no doubt Plaintiff was permitted ample opportunity to review the discovery as required by New Jersey Court Rule 7:7-7(b).

Moreover, the trial for Plaintiff's case was not heard until September 9, 1998, more than eighteen months after Plaintiff was permitted to view the discovery on March 12, 1997. This provided Plaintiff substantial time to prepare his defense.

Due process in its constitutional sense is little more than another name for fair play. *See State v. Langella*, 144 N.J.Super. 268, 284 (App. Div. 1976).

Due process connotes fundamental fairness. It is an element which, when missing, produces the reaction accorded to that which is "shocking to the universal sense of justice". *See id.* (citing *United States v. Russell*, 411 U.S. 423, 432 (1973)).

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appears the 2001 comments, which cite to the Appellate Division case, inaccurately rely on this case.

The actions of Defendants did not violate Plaintiff's right to fundamental fairness because Plaintiff ultimately viewed the discovery concerning the charges against him. After viewing this discovery, he had over a year and a half to consider and prepare a defense to the State's case.

Moreover, charging a diminutive fee that is commonly charged throughout the State cannot be considered "shocking to the universal sense of justice".

Plaintiff was clearly provided discovery in accordance with New Jersey procedural law and not deprived of his due process rights.

Accordingly, the crux of Plaintiff's case, i.e., that his due process rights were violated because discovery was not provided, cannot be proven and his Complaint should, respectfully, be dismissed.

POINT II

MR. GIANOS, MR. RYLAK AND MR. RUBIN ARE ENTITLED TO THE AFFIRMATIVE DEFENSE OF QUALIFIED IMMUNITY UNDER BOTH FEDERAL AND STATE LAW BECAUSE THEIR ACTIONS WERE BOTH OBJECTIVELY AND SUBJECTIVELY REASONABLE.

A. FEDERAL LAW

In the subject litigation, Plaintiff claims his due process rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution were violated by Defendants' alleged failure to provide discovery relative to his speeding ticket.

Accordingly, Plaintiff seeks redress pursuant to 42 U.S.C. Sec. 1983 (hereinafter "Section 1983").

Section 1983 provides a cause of action for "deprivation of any rights, privileges, or immunities secured by the Constitution and laws of the United States" by any person acting under "color of any statute, ordinance, regulation, custom, or usage, or any State or Territory." 42 U.S.C. Section 1983.

Section 1983 is not itself a source of substantive rights. Rather, it merely provides the method for vindicating Federal rights elsewhere conferred. *See Albright v. Oliver*, 510 U.S. 266 (1994).

Thus, to sustain a successful Section 1983 claim, Plaintiff must prove he has been deprived of a Federal right, and the person or entity that deprived him of that right acted under "color of law".

Significantly, qualified immunity base on "good faith" is an affirmative defense to Section 1983 claims against public officials. *See Plummer v. Department of Corrections*, 305 N.J.Super. 365, 370 (App. Div. 1997) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982)).

This immunity is available to public officials performing discretionary functions and protects "all but the plainly incompetent or those who knowingly violate the law". *Id.* (referring to *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

Although the provision of discovery is mandated by Rules of Court, the administrative manner in which such discovery is provided must logically involve the use of discretion. Mr. Gianos and Mr. Rylak are both private practicing attorneys and municipal prosecutors.

In order to perform these roles simultaneously, they needed to develop a method for compiling, copying and providing discovery that would allow for compliance with the new Jersey Court Rules, yet minimize the burden on the time and finances of their private practice. Accordingly, it was within their discretion to adopt the commonly used administrative fee as a way to balance these interests. (*See* Exhibit F).

Mr. Rubin was also acting in a discretionary manner when he chose not to take action against Mr. Gianos and Mr. Rylak.

Plaintiff informed him Mr. Gianos and Mr. Rylak were engaging in an allegedly inappropriate practice. However, being aware that this dispute was a municipal matter, Mr. Rubin exercised his supervisory discretion in directing Plaintiff to the Frenchtown Municipal Court and Offices of the Municipal Prosecutor.

Public officials acting in a discretionary role are thus generally "shielded from liability under Section 1983 insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.*

A "clearly established right" is one where the contours are sufficiently clear so that a reasonable official would understand when his actions violate that right. *See id.*

Accordingly, a public official will be immune from a Section 1983 suit if his/her conduct was justified by objectively reasonable beliefs. *See id.*

In addition, the United States Supreme Court held in *Gomez v. Toledo*, 446 U.S. 635 (1980):

> "[it is] the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with a good faith belief, that affords a basis for qualified immunity of [public officials] for acts performed in the course of official conduct. *The test focuses not only on whether the official has an objectively reasonable basis for that belief, but also on whether the official was acting sincerely and with a belief he was doing right.*" *Id.* at 641. (emphasis added).

Therefore, a public official's subjective belief is also an appropriate consideration in determining whether immunity applies.

This subjective belief may be based on state or local law, advice of counsel, *administrative practice*, or some other factor of which the official alone is aware. *See id.*

In the present matter, Mr. Gianos, Mr. Rylak, and Mr. Rubin each qualify for the good faith immunity available to public officials, insulating them from the current Section 1983 claims.[2]

They each acted objectively reasonable and with subjective good faith while carrying out their respective duties.

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[2] In *Point II*, the immunity of Defendants Rylak, Gianos and Mr. Rubin is explained. The immunity of Judge Martin will be discussed in *Point III*, infra.

MR. GIANOS AND MR. RYLAK

Mr. Gianos and Mr. Rylak demanded a discovery fee from Plaintiff with the understanding it was a reasonable and permissible practice under State procedural laws governing municipal practice. This understanding was based on their knowledge and perception of New Jersey Court Rules and the practice of other local municipal prosecutors. (*See* Exhibit F).

Specifically, Mr. Gianos and Mr. Rylak, in part, took guidance from New Jersey Court Rule 7:7-7(b), which as discussed in *Point I, supra*, governs municipal practice discovery and provides: "a defendant is entitled to discovery in all cases involving a consequence of magnitude or when ordered by the court." *R.* 7:7-7(b). (*See* Exhibit F.)

There is no provision in the Rules that directly addresses the imposition of discovery fees. The relevant New jersey Court Rule merely provides the defendant "shall be allowed to inspect, copy, and photograph or be provided with copies and any relevant reports . . . *within the custody of the prosecuting attorney*." *R.* 7:7-7(b). (emphasis added).

As also discussed in *Point I, supra*, it is implicit that discovery relevant to a municipal prosecution will be in the possession of municipal prosecutors, who are almost always local practicing attorneys. Therefore it is logical the cost associated with providing this discovery is going to be borne by these attorneys.

Accordingly, Mr. Gianos and Mr. Rylak believed they were entitled to reimbursement of the expenses borne by their office. Further evidencing this belief was Mr. Gianos

and Mr. Rylak's reliance on their personal knowledge that numerous similarly situated prosecutors charge an equivalent or greater fee. (*See* Exhibit F).

Finally, this practice was specifically noted to exist by the New Jersey Appellate Division in *State v. Green*, 327 N.J. Super. 334 (App. Div. 2000). The Court stated: "[W]e have a sense that the heart of the contention, the $25 administrative fee, may be the rule rather than the exception." (*See* Exhibit G at page 342).

Clearly, therefore, it was objectively reasonable based on the nature of local practice and New Jersey procedural law for Mr. Gianos and Mr. Rylak to charge a nominal fee for providing discovery.

Moreover, in good faith both Mr. Gianos and Mr. Rylak subjectively believed they were entitled to reimbursement of the expenses borne by their office in making discovery available to Plaintiff. (*See* Exhibit F).

MR. RUBIN

As Hunterdon County Prosecutor, the claims against Mr. Rubin are derivative of those against Mr. Gianos and Mr. Rylak.

Moreover, Mr. Rubin never had any direct contact with Plaintiff. Plaintiff contacted Mr. Rubin's office by telephone and was informed, through Mr. Rubin's secretary, that he should direct his complaint to either Frenchtown Municipal Court or the Offices of the Municipal Prosecutor, which is where the discovery dispute would be resolved.

Finally, the March 5, 1997 letter Plaintiff sent to Mr. Rubin complaining of the Prosecutors' actions in no way discredits Mr. Rubin's good faith belief the fee request was appropriate. (*See* Exhibit L).

There simply is no evidence whatsoever that Mr. Rubin's response in this matter was not objectively reasonable and premised on the subjective good faith belief Plaintiff's dispute was a municipal matter.

Accordingly, Mr. Gianos, Mr. Rylak, and Mr. Rubin are each entitled to qualified immunity under Federal law.

B. STATE LAW

In Plaintiff's Complaint, he invoked the Court's jurisdiction to consider claims arising under State law. (*See* Exhibit E). Although it is unclear whether this invocation was in regard to all claims asserted, Defendants are also entitled to immunity under New Jersey law.

Under the Tort Claims Act, *N.J.S.A.* 59:1-1, *et seq.*, a public employee is afforded immunity if he acts in good faith in the execution or enforcement of any law. *See N.J.S.A.* 59:3-3.

In order to meet this "good faith" standard, a public employee's actions must be objectively reasonable or performed with subjective good faith. *See Canico v. Hurtado*, 144 N.J. 361 (1996).

As discussed above in reference to Federal immunity, the actions of Mr. Gianos, Mr. Rylak, and Mr. Rubin were both objectively reasonable and exercised with subjective good faith.

Accordingly, the affirmative defense of qualified immunity is equally warranted under New Jersey law.

POINT III

JUDGE MARTIN IS ENTITLED TO ABSOLUTE JUDICIAL IMMUNITY FROM LIABILITY AS ESTABLISHED BY THE THIRD CIRCUIT COURT OF APPEALS.

Well-established law dictates judges are absolutely immune from liability for their judicial acts. *See K.D. v. Bozarth*, 313 N.J.Super. 561, 568 (App. Div. 1998).

"[T]he doctrine of judicial immunity is justified by strong public policy which recognizes that the independence . . . of the judiciary might be compromised if judges are exposed to threats of civil liability for actions taken in their judicial capacity." *Figueroa v. Blackburn*, 39 F.Supp.2d 479, 485 (D.N.J. 1999); *see also Antoine v. Byers & Anderson*, 508 U.S. 429, 435 (1993).

It is also "well settled that judicial immunity applies to Section 1983 actions", and applies "even as to judicial acts that are wrong, malicious, or beyond the judge's authority." *Id.*; *see also Pierson v. J.L. Ray*, 386 U.S. 547, 553-54 (1967); *Briscoe v. LaHue*, 460 U.S. 325, 334 (1983); and *Stump v. Sparkman*, 435 U.S. 349 (1978).

Judicial immunity has two prerequisites: (1) the act complained of must be a judicial act; and (2) the judge must have subject matter jurisdiction at the time he acts. *See K.D.*, 313 N.J.Super. at 568.

A "judicial act" is an act normally performed by a judge in his judicial capacity. *See id.* In the present case, it is clear that addressing a procedural dispute such as the

method for providing discovery is a normal function performed by a judge.

Thus, for purposes of the present case, the important inquiry is whether Judge Martin had subject matter jurisdiction at the time he intervened.

New Jersey Municipal Courts are clearly courts of limited jurisdiction. *See Figueroa*, 39 F.Supp.2d at 489. However, whether a judge has subject matter jurisdiction must be broadly construed in the immunity context, such that immunity will only be denied where the judge acted in the clear absence of all jurisdiction. *See K.D.*, 313 N.J.Super. at 568.

Furthermore, United States Magistrate Judge Freda L. Wolfson held in *Figueroa* that "application of the absolute judicial immunity standard to a court of limited jurisdiction is appropriate." *Figueroa*, 39 F.Supp.2d at 490.

In *Figueroa*, a municipal court judge was sued for entering a Contempt of Court Order against an individual who was being arraigned on harassment charges. The plaintiff filed a civil rights complaint alleging the judge failed to provide him with an automatic five-day stay of his sentence as provided by New Jersey Court Rules preventing him from filing an immediate appeal of his prison sentence. *See id.* at 481-83.

Judge Wolfson granted summary judgment in favor of the municipal judge because the municipal judge was acting in a judicial capacity when holding the plaintiff in contempt, and as explained above, the doctrine of immunity applies to courts of both limited and general jurisdiction. *See id.* at 495.

This decision was affirmed by the Third Circuit Court of Appeals in *Figueroa v. Blackburn*, 208 F.3d 435 (3rd Cir. 2000).

The Court held that judges of courts of limited jurisdiction, such as New Jersey municipal court judges, are entitled to absolute judicial immunity because "it is clear the role of [such a judge] is functionally comparable to that of a judge of a court of general jurisdiction." *Id.* at 442.

In the instant case, it is clear Judge Martin was: (a) acting in his judicial capacity when considering the discovery dispute; and (b) had subject matter jurisdiction over Plaintiff's Municipal Court Summons.

Moreover, Judge Martin did not make any decision concerning whether the State's evidence was properly in the possession of Mr. Gianos and Mr. Rylak. There was no need for Judge Martin to address this issue because, as discussed in *Point I, supra*, the Court Rules expressly provide discovery will be in the possession of the prosecuting attorney(s).

As also discussed in *Point I, supra*, it is therefore implicit that discovery relevant to a municipal prosecution will be in the possession of municipal prosecutors, who in this case, as in most municipalities, are local practicing attorneys.

Accordingly, Judge Martin is entitled to absolute judicial immunity from liability for his "judicial acts" regarding the discovery fee dispute in this matter.

POINT IV

PLAINTIFF CANNOT MAKE THE FACTUAL SHOWING REQUIRED TO SUPPORT HIS BARE ALLEGATION MR. GIANOS AND MR. RYLAK ARE LIABLE FOR MALICIOUS PROSECUTION.

To state a claim for malicious prosecution under Section 1983, Plaintiff must satisfy the elements of a state law malicious prosecution action. *See Cooper v. Smith*, 936 F.Supp. 515 (1996); *Russell v. Smith*, 68 F.3d 33 (1995); and *Treece v. Village of Naperville*, 903 F.Supp. 1251 (1995).

Plaintiff in a malicious prosecution action under New Jersey law must prove the original action complained of was: (1) brought without probable cause; (2) actuated by malice; (3) terminated favorably to the plaintiff; and (4) Plaintiff suffered a special grievance. *See LoBiondo v. Schwartz*, 323 N.J.Super. 391, 423 (1999).

In the present matter, Plaintiff alleges Mr. Gianos and Mr. Rylak are guilty of malicious prosecution/use of process.

However, this bare allegation is not supported by any facts adduced. First, there was probable cause as a matter of law, and in fact, for Plaintiff to be issued a speeding ticket on January 14, 1997. Second, there are no facts adduced which support Plaintiff's allegation Mr. Gianos and Mr. Rylak acted with malice or intent.

A. EXISTENCE OF PROBABLE CAUSE

Plaintiff was allegedly driving through a twenty-five (25) mile per hour school zone at a clocked speed of fifty

one (51) miles per hour. However, as discussed in the January 19, 2000 Appellate Division decision, the statute establishing this twenty-five mile per hour zone indicates this speed limit is only applicable "during recess, when the presence of children is clearly visible from the roadway, or while children are going to or leaving school during opening or closing hours . . . " (*See* Exhibit G at page 338).

The Appellate Court found it was not established beyond a reasonable doubt that school children were in motion at the time Plaintiff was stopped. The officer testified his patrol car was stationed directly across from school at the time of the stop because school ordinarily let out at that time.

Since the officer could not testify he had actually witnessed children present, the court held the State failed to establish beyond a reasonable doubt Plaintiff was subject to the twenty-five mile per hour speed limit. (*See* Exhibit G at pages 338-339).

Nevertheless, Plaintiff was clocked at a speed of fifty-one miles per hour on the residential road of Harrison Street, Borough of Frenchtown, New Jersey, in front of an elementary school. (*See* Exhibit G at page 337). Thus, regardless of whether the twenty-five mile per hour speed limit was applicable at the time, Plaintiff's speed exceeded that which is otherwise permitted on this residential road[3]. Accordingly, there was probable cause as a matter of law for the officer to stop Plaintiff.

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[3] According to the Clerk at Frenchtown Borough Hall, the speed limit on Harrison Street is always 25 miles per hour, and is 15 miles

(Continued on following page)

In addition, the appropriate inquiry in determining whether probable cause existed in fact for Plaintiff's speeding ticket is whether a reasonable officer could have believed there was probable cause in light of the information in the officer's possession. *See Berg v. County of Allegheny*, 219 F.3d 261, 272 (3rd Cir. 2000).

A reasonable officer, based on his experience of parking across from a school every day to ensure the safety of entering or exiting children, would have believed the twenty-five mile per hour speed limit was applicable.

Therefore, the officer who issued Plaintiff's speeding ticket had probable cause to do so, even if it was not established beyond a reasonable doubt that children were actually present.

B. ABSENCE OF MALICE OR INTENT

The facts adduced do not support Plaintiff's bare allegation Mr. Gianos and Mr. Rylak acted with malice or intent to deprive him of due process rights. To the contrary, the evidence clearly indicates Mr. Gianos and Mr. Rylak made every effort, short of waiving the disputed fee, to make discovery available to Plaintiff.

Accordingly, Mr. Gianos and Mr. Rylak are entitled to judgment as a matter of law.

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per hour when the school zone limit is applicable. Although this slightly differs from the Appellate Division's description of the school zone speed limit, it clearly indicates the permissible speed on Harrison Street is no greater than fifty (50) miles per hour.

POINT V

SINCE MR. GIANOS AND MR. RYLAK ARE NOT LIABLE FOR THEIR ALLEGED WRONGFUL ACTIONS, THE LAW FIRM OF RYLAK & GIANOS, AS A PARTNERSHIP, CANNOT BE LIABLE AND IS ENTITLED TO SUMMARY JUDGMENT.

Regarding partnerships, *N.J.S.A.* 42:1-13 provides "where, by any wrongful act . . . of any partner acting in the course of the business of the partnership . . . loss or injury is caused to any person, the partnership is liable therefor to the same extent as the partner so acting". *N.J.S.A.* 42:1-13; *see also Eule v. Eule Motor Sales*, 34 N.J. 537, 542 (1961).

The Law Firm of Rylak & Gianos is a partnership, of which Mr. Gianos and Mr. Rylak are partners. (*See* Exhibit F).

Mr. Gianos and Mr. Rylak, in part, were acting in the course of their partnership's business when they sought a discovery fee from Plaintiff as a means to reimburse the anticipated cost to their firm of obtaining such discovery.

In *Point II* and *Point IV, supra*, it was explained that Mr. Gianos and Mr. Rylak are not liable for any wrongful act. Accordingly, the Law Firm of Rylak & Gianos cannot be liable and is entitled to judgment as a matter of law.

POINT VI

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD BE GRANTED BECAUSE NO GENUINE ISSUE OF MATERIAL FACT EXISTS.

Federal Rule of Civil Procedure 56 provides a court should enter summary judgment if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* F.R.C.P. 56; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Once the moving party has satisfied this initial burden, the opposing party must establish that a genuine issue exists. *See Jersey Central Power & Light Co. v. Lacey Township*, 772 F.2d 1103, 1109 (3rd Cir. 1985), cert. denied, 475 U.S. 1013 (1986).

However, not every issue of fact will be sufficient to defeat a motion for summary judgment; issues of fact are genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Furthermore, the opposing party cannot rest upon mere allegations; it must present actual evidence that creates a genuine issue of material fact. *See id.* at 249 (citing *First Nat'l Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 290 (1968)).

The court must draw all reasonable inferences in the opposing party's favor, and must accept the party's evidence when considering the merits of the summary judgment motion. *See Pollock v. American Tel. & Tel. Long Lines*, 794 F.2d 860, 864 (3rd Cir. 1986).

Accordingly, it is respectfully submitted that in consideration of all the material evidence, Defendants are entitled to judgment as a matter of law.

CONCLUSION

Based on the foregoing, it is respectfully requested the Court enter an Order granting summary judgment and dismissing any and all claims against each Defendant with prejudice.

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In The
Supreme Court of the United States

JOHN GREEN
Petitioner
v.

WILLIAM GIANOS, ALBERT RYLAK
JEFFREY MARTIN, LAW FIRM OF
RYLAK & GIANOS AND STEPHEN RUBIN
Respondents

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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INTRODUCTION

This reply brief is to address some new points raised by the Respondents, and correct errors in their Counter-Statement of Case.

I. ERRORS IN THE DEFENDANT'S COUNTER STATEMENT OF CASE.

The Respondents assert that before 2001, the New Jersey Court Rules did not address whether prosecutors could charge a fee for providing discovery in municipal cases, this is some what misleading. This is not what State v Green 327 N.J. Super 334 (App. Div 2000) held. The New Jersey Supreme Court rules committee interpreted State v Green to say,

New Jersey Court Rules, Rule 7:7-7

> "As to the "fee," the court rules governing discovery in the municipal court, either those in existence of the time of the infraction or currently, do not authorize a municipal prosecutor to charge what the prosecutor apparently views as an administrative fee to cover his overhead." State v Green 327 N. J. Super, 334, * 340, 743 A.2d 357, **360.

So this, "administrative fee" is not authorize, Green refused to pay an unauthorized fee and he was denied discovery. And certainly the rules don't allow for a prosecutor to demand funds for his own personal benefit.

Then they try and mislead this court by implying that the $25.00 fee was set because of the administrative cost associated with compiling, locating and copying the, "voluminous" discovery Green asked for. The $25.00 flat fee was established before Green every came in contract with their prosecutor, see respondents Brief, Page 12, so this fee had nothing to do with what Green asked for. Green was not even allowed to make copies of the items unless he gave up his right to sue for violations of his constitutional rights

in a private civil action (DA 6A-7A and State v Green).

Now the assertion that the Petitioner refused to pay for discovery is totally untrue, what Green refused to do was pay the copying cost *plus* give up another constitution right, the right to sue, in this country we don't have to trade one constitution right to gain another (DA 6A-7A).

Judge Martin coupled the Court would making photocopies of the items that the prosecutor had in Court on March 12, 1997, and Green paying copying cost (Which Green agreed to pay) with the signing of a release not to file a private suit against Mr. Gianos and his law firm, Green refused to give up a constitution right to sue, see Stave v Green.

Now as the Court found in State v Green, Green did not received discovery on March 12, 1997, or any other time.

Lastly the Respondents assert that Green did not challenging the constitutional basic of the lower Courts holdings. It's unclear what constitutional issues the respondents are talking about, Title 42 is not a constitution clause, it a statue. Although discovery itself is not a constitutional right, it's a due process right which Green certainly did address (Although Green did talk about Brady material he did forget to give the cite number for that case). And the defendants have not presented any evidence that prosecutors have stop charging monies for discovery. The same rules were in effect then, as now, and they still violated them. And this issue is bigger then New Jersey, the Third Circuit controls three states, so when the court turns its head when public officials use their office for private enrichment is a matter of great public importance. Now the respondents may not think it's important how pro se litigants are dealt with by the federal courts, but this Court has always felt that it's an important issue.

II. THE RESPONDENTS VIOLATED CLEARLY ESTABLISHED LAW.

The Respondents argue that the Third Circuit chose not to

discuss the qualified immunity issue because it was an unnecessary step in its analysis. The Respondents just gave another reason why this Court should grant the petition. In this age of the Internet, where unpublished cases are just a mouse click away the role of this Court is even more important. The district court held that the subjective element is reason to grant summary judgment. Green on appeal argued it wasn't. By the Third Circuit remaining silent and not correcting the district court we have the Respondents, the ones that instruct the public on what their legal rights are, and attorneys that use the internet to research unpublished cases, believing that that the Third Circuit has returned to pre Harlow v Fitzgerald 457 US 800 (1982) days.

Qualified immunity turns on the "objective legal reasonableness" of the action, assessed in light of the legal rules that were "clearly established" at the time the action was taken, see ANDERSON v. CREIGHTON, 483 U.S. 635 (1987). Although this Petitioner clearly addressed the issue of subjective element of the defendant's state of mind, they state of mind is irrelevant to qualified immunity.

I'm not sure what law was not clearly established. Court rules are not laws; they are put in replace by the court to insure a fair trial is had by all parties. Although court rules are not constitutional rights per se, violation of them can, and did result in a constitutional violation of Green's rights. The right to discovery is clearly established when the discovery the that is requested is material to the guilt or punishment, Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963). And the Court in State v Green found that case law held that he was entitle to discovery, and he was entitled to more discovery then the prosecutors felt they had to give. Now during the dispute in the municipal court, Green was gave the Respondents the same case law that the court in State v Green cited, so they can't now claim that they didn't know the law, they just chose to ignore it. It was also clearly established common law that a public official can't use their office for

personal financial gains at the expenses of the constitution right of a citizen. This was one of the main issues Green cited in his opposition to summary judgment, but the District Court ignored this issue, so Green cited abuse of discretion in his section, "Scope of review." in his brief in support of Appeal.

Green argued that this was extortion and Green also argued to the District and Third Circuit Court that this also can be view as soliciting a bribe form the prosecutors to provide discovery. Green knew that a public official that used their office for personal financial gains was illegal and if Green this pay this bribe, he would be just as criminally guilty as the respondents on this issue.

Both the Appellate Court in State v Green and the New Jersey Supreme Court Rules Committee held that it was clearly established that at the time of this dispute that the Court rules did not allow charging this type of fee for discovery. And State v Green held in dicta that not only was Green's rights to discovery violated, but the prosecutors demands was unauthorized by court rules and clearly ***unreasonable***. The District Court gave the opinion of State v Green and New Jersey Supreme Court Rules Committee the very little weigh.

Although the Respondents complain about the number of items that Green asked for in discovery, they have not disputed the fact that the items Green asked for were items that New Jersey Case law said was relevant to a defense in the type of offence Green was charged with.

It should also be noted that in all the filing by the Respondents in the federal case and also in the municipal case that they have yet to cite one statue, rule or case law that supports their view that they could charge this fee and use it for their personal financial gain.

III. PETITIONERS FIRST ARGUMENT IS NOT MOOT

The Respondent claim that the Petitioner's first argument is

without merit because the New Jersey Court rule now says that they may not charge an administrative the problem is now moot. This argument is problematic for the respondents. The first problem is that even the District court didn't believe that State v Green corrected the violation, Petitioners Appendix 19A; Judge Thompson;

> "However, the Court strongly suggests that municipality revisit the appropriateness of requiring a flat twenty – five dollar fee, as opposed to per page fee or no fee at all."

Now Judge Thompson erred in believing that this fee was a municipal fee, there was never any evidence that the municipality was even aware of this fee, it was clearly a fee that a private law firm wanted, and the District Court believed that this was still going on.

Next they say that in the comments to 2002 and 2003 of the New Jersey Court rules it expressly prohibit municipal prosecutors from charging any fee they wish, so they admit now that they were prohibited form doing the exact thing they did, because the first line on the comment in the New Jersey rules tells us that this was in effect at the time of the offence and trial of the Petitioner.

The Respondents argue that they did not demand the $ 25.00 fee to further a personal interest, but rather to cover the anticipated administrative expenses borne by their private law firm in doing the job as prosecutors. The Law firm of Rylak & Gianos is a partnership and Mr. Gianos is a partner, see Gianos Affidavit PA 26A. Para 1 They make no claim that the Court, the State, or the municipality has an interest in this law firm, so it's their personal interest any way you slice it. They presented no evidence that they would lose money in providing discovery, nor how often they are asked to provide discovery in municipal cases. The claim that they borne an additional financial burden of having to pay local police departments for their copying costs is without merit. They refused to allow Green to copy

the items that they already had in court of March 12, 1997, which they admitted they would be using in court against Green, so they needed them anyway. This is not a case of municipal prosecutors demanding a fee to paid to the municipality, the police, the court or the state to recover the cost of copying the items from the petitioner, the petitioner was clearly willing to pay that(DA 6A-7A). This is a case of attempted thief by extortion and they used their official position under color of law to do it.

They knew, and in fact it is their duty to know that reviewing and providing discovery is the job of the municipal prosecutor. And if they didn't know this they still have no excuse because Green provided the case law to them during the time he was seeking discovery.

Mr. Gianos has been an attorney for twenty years, see PA 27A Para 5. Mr. Gianos is the municipal prosecutor for four other municipalities, see PA 27A Para 6. No one twisted their arms to apply for and accept the jobs as municipal prosecutors, they did it of their own accord, knowing what the law says the responsible are, and knowing what they would get paid. If they negotiated a fee with the municipal that would not cover the cost of fulfilling their responsible as municipal prosecutors, then they set the fees too low and they lose money, Just like and other bidder on any other municipal contract. That does not give them the authority to seek financial rewards by withholding information that a defendant needs to prove he is not guilty. This is wrong, this is an abuse of their office, and this is what 42 Sec 1982 is meant for.

They wrongly assert that although at the time the New Jersey Court Rules did not expressly authorize charging a fee for discovery, it did not expressly prohibit this charge either, that's wrong according to the New Jersey court rules, but lets assume that they did not expressly prohibit the fee. When the President is sworn in I don't hear them ask him, oh by the way you know that you can't take bribes or extort

money from people. It's common law that public official can't use their office for personal financial rewards, even if being in that office personally cost them more then what they are paid. Common law extortion is when a public official makes a demand to be paid a fee that is not authorized, see Rollin M. Perkins & Ronald N. Boyce, Criminal Law 538 (3d ed. 1982).

This issue is not moot, this courts ruling would not affect any court in any municipal in any State from doing what they did to Green, the ruling of the New Jersey Appellate Court can't accomplish this in the other 49 states, the Third Circuits ruling affects three states.

IV.The Mathews v Eldridge Standard.

The district court cited Mathews v Eldridge 424 US 319 (1976) to support its view that all Green was entitled was to be heard a "meaningful manner (PA 19A)." and the Third Circuit cited that case also.

In Mathews v Eldridge is a test to evaluate if the procedure was constitutionally sufficient, both the Respondents and this Petitioner agree that neither the District nor the Third Circuit court did this test. And how could they? This administrative fee was not a government statue or rule; this was a procedure that the respondents made up for their personal financial gains. There was no the government's interest here; this was the personal interest of the prosecutors. How could there be a hearing in a meaningful manner when the prosecutor had a personal interest in the enforcement of this fee, and we can see from their argument that the discovery given was not based of the defendant's constitutional rights, but rather the cost to their personal law firm.

Although Green fully argued to the Third Circuit that Mathews v Eldridge is really not at the same magnitude as State v Green, Green was a case when he could have been put in jail, Mathews v Eldridge was just a civil administrative case, the defendants chose not to

address that in their Brief in Opposition to the Third Circuit, but now they want to argued this point. Green agrees that the New Jersey case law says that traffic violates are, quasi-criminal, but the defendants protections are the same as someone charged with a crime. The New Jersey Supreme Court held in STATE V. WIDMAIER 157 N.J. 475, 724 A.2d 241 (S. Ct. 1999)(talking of Traffic violations)

> "see also State v. Francis, 67 N.J. Super. 377, 381, 170 A.2d 476 (App. Div. 1961) (holding that defendants charged with quasi-criminal offenses "are entitled to the same protections as are normally accorded one accused of a criminal offense")."

The discovery rule that was to be used in this case was New Jersey Court rule R. 3:13-2 and R. 3:13-3 as outlined by State v Green. This is the rule for criminal cases, and this Court held in MEDINA v. CALIFORNIA, 505 U.S. 437 (1992) that Mathews v Eldridge was not the proper test to evaluate if the procedure was constitutionally sufficient in these type of cases.

V. PETITIONER WAS ENTITLED TO THE RIGHT TO HAVE PROSECUTORS WITHOUT A FINANCIAL INTEREST IN DISCOVERY.

The Petitioner cited many cases wish held that a defendants was entitled to a prosecutor without conflicting loyalties, the Respondents address only one of those cases, Marshall v. Jerrico 446 US 238 (1980). But this case said;

> "A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some [446 U.S. 238, 250] contexts raise serious constitutional questions."

All one has to do is read their Brief to see one of their main concern was getting personal reimbursement for the

expense of prosecuting Green. They argued in court this administrative fee, an issue that they had a personal financial interest in. And they did stand to profit personally in the issue of this discovery fee because they were already being paid to do the job of a prosecutor, and they wanted additional money from Green. So the decision to enforce this fee was purely based on private personal interest, and not law. Also the amount of discovery they would give Green was based what is would could their personal law firm, not what Green was entitled to.

Now it's untrue that there was not even an appearance of impropriety, it's undisputed that Mr. Gianos was removed from this case before of the conflict of interest here, it was only when the new prosecutor would not prosecute Green that the matter was returned to Mr. Gianos partner, Mr. Rylak to prosecute.

Was Judge Martin a disinterested party in this case, only discovery will show. Well Green had shown that the prosecutors and the Judge had ex parte meeting on this case, discussing parts of the case. We know that on, March 12, 1997 Judge Martin granted Green items in discovery, and told him he would get them that day, but took that away from Green unless Green gave up his rights in file a civil case. We know that Green presented results from respected law journal in New Jersey, on a study on the problem of municipal courts in used as "cash cow". The New Jersey Law Journal, on Feb. 28, 1994, said in this study, "municipal governments regard local courts as cash cows." Green also presented evidence of a municipal Judge getting fired for not bringing in enough fine money. So there are real problems in New Jersey municipal court not being used for justice, but to raise money for towns. Discovery should go on; there are many questions here, when Judge Martin disqualified Mr. Gianos and replaced him with a new prosecutor (not Mr. Rylak) why didn't he prosecute this case?

Could it be, as Green alleges, that there was no evidence that Green committed any offence, and there was no reason to prosecute?

VI. Failure to instruct

The Respondents argue that Green submitted no evidence that the Third Circuit has ruled pro se litigants should be given special guidance by the district court on summary judgment procedure, that's correct, and it should be clear that they don't consider a pro se's confusion on summary judgment matters a reason to return the matter to the district court, other circuits have. The Respondent removed all doubt that the petitioner was confused, they included the petitioner's letter to the District Court's Judge showing that the petitioner did not have a total understanding of Federal Civil Rule 56(Respondent's Appendix 8A). It was clearly the petitioners understand that CELOTEX CORP. v. CATRETT, 477 U.S. 317 (1986) meant that they were bears the initial responsible to identify those clauses of action which it believes demonstrate the absence of a genuine issue of material fact.

Green believe the evidence shows that these prosecutors used their position for a personal gain, but even if there was no constitutional violation, and this was just a matter of violation of a State Court rule, then summary judgment is still improper. As Green has shown with New Jersey case law holds that he is entitle to recover his cost caused by the violation of the discovery rules, and State v Green already commented on the violation. Green did ask for these cost in his complaint.

CONCLUSION

I ask this Honorable Court to grant this petition.

Respectfully submitted

JOHN GREEN DATED: OCTOBER 24, 2002